

FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OUTORDER TERM, 1953

No. 476

**BRANIFF AIRWAYS, INCORPORATED,
APPELLANT,**

vs.

**NEBRASKA STATE BOARD OF EQUALIZATION
AND ASSESSMENT, ET AL**

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

FILED NOVEMBER 22, 1953

Probable jurisdiction noted January 4, 1954



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 476

BRANIFF AIRWAYS, INCORPORATED,
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APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

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[Caption omitted]

[fol. 3] **IN THE SUPREME COURT OF NEBRASKA**

MID-CONTINENT AIRLINES, INC., a Corporation, Plaintiff,

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT;
 PHILIP K. JOHNSON, Nebraska State Tax Commissioner;
 VAL PETERSON, Governor of Nebraska; JAMES S. PITTEN-
 GER, Secretary of State of Nebraska; RAY C. JOHNSON,
 State Auditor; FRANK HEINTZE, Treasurer of Nebraska;
 and CLARENCE S. BECK, Attorney General of Nebraska,
 Defendants

General Number

PETITION IN ORIGINAL ACTION FOR DECLARATORY JUDGMENT—
 Filed July 16, 1952

1. Permission to file this original action in accordance with the Rules of this Court having heretofore been obtained, plaintiff files this, its petition seeking a declaratory judgment in this Court under the laws of the state of Nebraska (Sections 25-21,149 to 21,164, R.S.N. 1953, construed in *Moeller, McPherrin & Judd v. Smith*, 127 Neb. 424; *State, Ex Rel. Smrha v. General American Life Insurance Co.*, 132 Neb. 520; *Thorin v. Burke*, 146 Neb. 94).

2. Plaintiff seeks to have declared null and void and non-enforceable against it by the defendants Sections 77-1244 to 1250, R.S.N. 1943, Reissue 1950, for the reason that said statute is in violation of Article I, Section 8, Clause 3, of the Federal Constitution, which gives to the National Congress alone the right to regulate commerce among the several states, and Article I, Section 9, Clause 6, of the Federal Constitution which provides, as a prohibition against the State of Nebraska, that no vessel bound to or from one state shall be obliged to pay duties in another state. Furthermore, Article I, Section 10, Clause 3, of the Federal Constitution specifically provides that no state shall, without the consent of Congress, lay any duty of tonnage. All these provisions of the Federal Constitution have been violated by the defendants under the terms of

said Act, especially Article I, Section 8, Clause 3, which prohibits the State of Nebraska from levying an ad valorem [fol. 4] tax upon the air flight equipment of the plaintiff as provided in said Act. No other questions are presented to this Court for final adjudication except the violation of these sections of the Federal Constitution.

3. Accordingly, as will hereinafter more fully appear, this Court, under the admonition of the Federal Constitution, Article VI, Clause 2, should declare said Nebraska statute to be null and void and nonenforceable against the air flight equipment of the defendant because used in interstate commerce.

4. The incident of the tax is the airship fully equipped for flight, and the ad valorem tax thereon burdens commerce between the states by permitting the defendants to levy a tax on such airships of the plaintiff solely because they are within the State of Nebraska while engaged in interstate commerce and attain no taxable situs while so engaged. It will be seen from the reading of the Act that its terms are made applicable only to air flight equipment, which means, according to the terms of the Act and as a matter of fact, the airplane fully equipped to carry persons and property into and out of the State of Nebraska in interstate commerce. The question presented to the Court has no application to real and personal property of the plaintiff that is taxable, because the same has a taxable situs in the state and the plaintiff does pay taxes and assessments on all such other of its property within the State of Nebraska.

5. The amount of the tax levied unlawfully, as claimed by the plaintiff, for the year 1950 is approximately \$4,000.00, and a similar amount for 1951, neither of which sums has been paid by the plaintiff. Defendants are now engaged in assessing other and additional amounts against the plaintiff for the year 1952, and will continue to do so to the injury and damage of the plaintiff unless in this action this Court decrees said taxing statute to be null and void and contrary to the provisions of the Federal Constitution and therefore nonenforceable, and that the taxes assessed be cancelled and future taxes, if any, sought to be levied by the defendants be permanently restrained and enjoined.

6. Having stated the jurisdictional questions and the legal points involved, the plaintiff further alleges as follows:

[fol. 5]

I

Plaintiff is a corporation organized under the laws of Delaware as an air carrier of persons and property, having its home port, to which all of its airplanes must return, at Minneapolis and St. Paul and its general offices and principal place of business at Kansas City, Missouri. Plaintiff is licensed by the Civil Aeronautics Board of the United States to engage in interstate transportation by air for hire. Plaintiff's rights, activities and operations are subject to and are all carried on by permission and under the authority of the United States of America, as defined in the United States "Civil Aeronautics Act," Title 49 U.S.C. § 401 to 705. By virtue of such federal authority, plaintiff has been federally licensed to operate as an air carrier, and in pursuance thereof owns and operates a large number of aircraft upon regular schedules in trunk line flight throughout the central portion of the United States from Minot, North Dakota, to New Orleans, Louisiana, alighting in and ascending from the states of North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Illinois, Kansas, Missouri, Oklahoma, Arkansas, Texas, and Louisiana. Plaintiff's aircraft enter the State of Nebraska from the air above and leave Nebraska into the air above. Plaintiff's aircraft are in the State of Nebraska only temporarily to unload and load passengers, mail, and personal property in interstate flight.

II

The defendants constitute the administrative and law enforcement officials of Nebraska on all matters pertaining to the ad valorem personal property taxes assessed by them against plaintiff's aircraft for alighting in and departing from this state. The defendant, State Board of Equalization and Assessment, is composed of all the defendants named (Sections 77-501 and 502, R.S.N. 1943), except the defendant Attorney General, who is the law enforcing official for said Board and the members thereof in the matters of state taxation. Each defendant is the duly

qualified and acting official and Board member of said State Board of Equalization and Assessment, and the defendant, Philip K. Johnson, is the State Tax Commissioner, as designated and described in the above-caption and is a member of said defendant Board. Each defendant is a citizen of the State of Nebraska.

[fol. 6]

III

The state Act in question directs the defendants to evaluate, assess, levy, and enforce the collection of the said ad valorem personal property tax based on the valuation of plaintiff's interstate "flight equipment" as found, assessed, and enforced by the defendants. The said flight equipment as defined in said Act consists solely of aircraft fully equipped for flight as an air carrier. The aircraft is used solely to carry on the activities in interstate commerce as described above. Plaintiff's aircraft are taxed under the state Act questioned herein when they descend from the air and remain in Nebraska for the short periods of time necessary to unload and load passengers, mail, and personal property moving in interstate commerce. The taxed aircraft temporarily descend from the air into Nebraska and continue their interstate flight into the air carrying interstate-bound persons and property.

IV

By the terms of said Act (77-1244 to 1250) aircraft engaged solely in intrastate flight, operating from a fixed base in the state, are exempt from the tax upon aircraft, and thus only aircraft engaged in interstate commerce are subject to the questioned tax.

V

On or about December 1, 1950, to save interest at ten per cent and penalties for nonpayment and to avoid the issuance of a distress warrant, plaintiff herein sought to pay under protest the taxes levied for 1950. By so doing, plaintiff sought to sue for the recovery of the tax paid, but said right and authority to so proceed were held by the defendant Attorney General to have no application to the spe-

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cial tax statute for air carriers as defined in said Act and as set forth above.

Wherefore, plaintiff, Mid-Continent Airlines, Inc., a corporation, prays:

1. That this Court determine and find that the sections of the Nebraska statute, Sections 77-1244 to 1250, R.S.N. 1943, be declared null and void and nonenforceable in each and all its sections and provisions, upon the grounds that such Act, and each and every part thereof, violates one or [fols. 7-8] more of the Commerce Clauses of the Federal Constitution set forth above.

2. That this Court restrain and enjoin the defendants, and each of them and their successors in office, from performing any of the provisions of said Sections 77-1244 to 1250, R.S.N. 1943, Reissue of 1950, and restrain and enjoin the defendants, and each of them, from issuing a distress warrant or distress warrants or seeking to collect the tax for 1950 or for 1951, or the interest or penalties provided by the Act, or from in any other manner seeking to enforce the assessment, levy, or collection of any tax or assessment heretofore made or to be made under said Sections 77-1244 to 1250 of said Nebraska Revised Statutes for 1943 as amended.

3. That plaintiff be granted such other and further relief as the Court may deem just and equitable in the premises, the recovery of its costs, and a declaratory judgment so announcing with finality the adjudication of this Court on the constitutional invalidity of said Nebraska air flight equipment statute.

Dated at Omaha, Nebraska, July 12, 1952.

Mid-Continent Airlines, Inc., a Corporation, Plaintiff, By (S.) Wm. J. Hotz, Of Hotz & Hotz, 1530-5 City National Bank Building, Omaha, Nebraska, Its Attorneys.

Duly sworn to by William J. Hotz. Jurat omitted in printing.

[fol. 9] IN THE SUPREME COURT OF THE STATE OF NEBRASKA

[Title omitted]

ANSWER—Filed Aug. 18, 1952

Come now the defendants and for answer to the plaintiff's petition say:

1. Defendants admit the allegations stated in paragraph numbered 1 (Arabic).

2. Defendants deny the allegations stated in paragraph numbered 2 (Arabic) that the act consisting of sections 77-1244 to 77-1250, R.R.S. 1943 runs afoul, or violates any, of those provisions of the Constitution of the United States which are cited by plaintiff in paragraph numbered 2 (Arabic).

3. Defendants deny the allegations contained in paragraph numbered 3 (Arabic).

4. Defendants deny generally all the allegations stated in paragraph numbered 4 (Arabic), but specifically admit only so much of the allegations of said paragraph as affirm, substantially, that the tax authorized to be levied by the act is to be levied upon flight equipment owned by the plaintiff.

Defendants say further that there is involved in this action the propriety of the exercise by the legislature of a power so to classify all tangible property assumed to have a tax situs in Nebraska as to discriminate between tangible [fol. 10] property having a local situs and tangible property having a general situs, and to fix the situs of the latter class within a taxing district having boundaries co-terminous with the boundaries of the state, the legislative purpose being to require all tangible property to be subjected to an ad valorem tax, the property having a local situs being assessed by a local assessor and the tax thereon being levied by a county board of equalization, and property having a general situs being assessed by the Tax Commissioner or the State Board of Equalization and Assessment and the tax thereon being levied by said board, the legislative object being to obtain uniformity of valuation and in the case of property having general situs to avoid and

obviate arbitrary and discriminatory action by local authorities, this legislative purpose being applied in the case of all transportation properties, including aircraft, an increment of the value of which rises out of the use to which such property is devoted, transportation of persons and property in intrastate and interstate commerce. Defendants admit that all tangible property of the plaintiff, other than aircraft, is assessed and taxed locally upon the same footing as all other tangible property in the state.

5. Defendants deny generally all the allegations of paragraph numbered 5 (Arabic) but specifically admit that the ad valorem taxes authorized by the act were levied upon a portion of plaintiff's flight equipment for the tax years 1950 and 1951, and that the tax so levied is in the approximate amount stated by plaintiff, and that, similarly, a tax will be levied upon a portion of plaintiff's flight equipment for the tax year 1952.

6. Defendants admit all the allegations of paragraph 6-I, save and except so much thereof as alleges that plaintiff's aircraft are in the State of Nebraska only temporarily to unload and load passengers, mail and personal property in interstate flight. Defendants say that plaintiff's aircraft are engaged in the business of transporting by air persons and property in Nebraska in intrastate and interstate commerce.

[fol. 11] 7. Defendants admit the allegations stated in paragraph 6-II.

8. Defendants deny the allegations stated in paragraph 6-III, and say that the statute challenged by plaintiff, sections 77-1244 to 77-1250, R.R.S. 1943, directs the Tax Commissioner of the State of Nebraska to ascertain and determine the value of all aircraft fully equipped for flight of all air transportation carriers incorporated or doing business in Nebraska, save and except the aircraft of carriers engaged solely in intrastate commerce and whose aircraft is based at only one airport within the state, and then to assess only so much of that value as may properly be apportioned to Nebraska, the apportionment being calculated by the formula prescribed in section 77-1245, which formula purports to reach so much of the value of the aircraft as is related to its use in Nebraska. Defendants say, further,

that the Tax Commissioner of Nebraska is an administrative officer with quasi-judicial powers whose office is created by section 28 of Article V of the Constitution of Nebraska, and in the performance of the duties and in the exercise of the powers pertaining to the office the Tax Commissioner has, in respect of the plaintiff and other carriers, so enforced the provisions of the challenged statute as to give to it an administrative construction which limits the range of application of the statute to aircraft of carriers who are engaged in business in Nebraska every day in the year and who have aircraft within the jurisdiction of Nebraska every day of the year; that plaintiff's aircraft move over fixed routes and regular schedules, daily, within the jurisdiction of Nebraska, doing intrastate and interstate business every day in the year at airports at Lincoln and Omaha, Nebraska. Defendants further say that the State Board of Equalization and Assessment is a tribunal having quasi-judicial powers, created by section 28 of Article IV of the Constitution of Nebraska, its members being the Governor, the Secretary of State, the State Auditor, the State Treasurer, and the Tax Commissioner, and that this board, pursuant to the command of the challenged statute, [fol. 12] levies a mill tax in an amount equal to the average rate of the mill tax levied upon all tangible property throughout the several taxing districts of the state, upon the valuation for tax purposes of so much of plaintiff's aircraft as is determined by the Tax Commissioner to have a tax situs in Nebraska; that the average mill rate so levied upon a portion of the value of plaintiff's aircraft is invariably lower than the rate levied upon tangible property having a fixed situs for taxation within the boundaries of the taxing districts within which are situated the cities of Lincoln and Omaha, respectively.

9. Defendants deny the allegations contained in paragraph 6-IV, and say that aircraft which are engaged solely in intrastate transportation and are based at only one airport within Nebraska are subject to assessment and taxation as tangible property having a local situs, and that all aircraft are subject to assessment and taxation under the provisions of the challenged statute if the case be that such aircraft are engaged solely in intrastate commerce

and are based at more than one airport in Nebraska; and if the case be that aircraft are engaged in intrastate and interstate commerce, or if such aircraft are engaged in interstate commerce, and the case be, further, in respect of the latter two classes, that such aircraft move over fixed routes and regular schedules, and are found, every day of the year within the jurisdiction of Nebraska.

10. Defendants admit that plaintiff made inquiry of the Tax Commissioner whether the tax could be paid under protest but say that plaintiff was advised that no statute authorizes suit to be brought to recover back taxes paid, whether or not paid under protest, into the general fund of the State of Nebraska and that the taxes levied in this case are taxes which are required to be paid into the general fund. Defendants admit that the taxes levied draw interest at ten per centum per annum, if not paid when due, but deny that any other penalties are imposed for delinquency, and deny that any distress warrant has heretofore been issued or that any will be issued during the [fol. 13] pendency of litigation concerning the validity of the challenged statute. Defendants deny, otherwise, the allegations of paragraph 6-V.

Nebraska State Board of Equalization and Assessment; Philip K. Johnson, Nebraska State Tax Commissioner; Val Peterson, Governor of Nebraska; James S. Pittenger, Secretary of State of Nebraska; Ray C. Johnson, State Auditor; Frank Heintze, Treasurer of Nebraska; and Clarence S. Beck, Attorney General of Nebraska, Defendants. By: Clarence S. Beck, Attorney General, By: (S.) William T. Gleeson, Deputy Attorney General, Attorneys for Defendants.

[fols. 14-15] *Duly sworn to by Clarence S. Beck. Jurat omitted in printing.*

[fol. 16] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

STIPULATION OF FACTS—Filed Feb. 26, 1953

1. Plaintiff is a corporation, organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in said state. The principal object of its incorporation was and is the owning and operating of airplanes as carriers by air of persons and property for hire. From other states it operates its planes for such purposes on regularly scheduled stops in and out of the State of Nebraska. All its planes are fully equipped for flight through the air and are designed and constructed to descend from the air above to an airport built for the landing and taking off of such aircraft. Two such landing fields have been provided for such purpose in Nebraska, one by the municipality of Omaha, and one by the municipality of Lincoln. At these air fields plaintiff neither owns nor maintains hangars for reconditioning, overhauling, repairing, or storing aircraft, its engines, or any of its flight equipment.

2. Plaintiff's principal activities in Nebraska consist of descending from the air above the state to unload persons and property from other states and promptly load persons and property in the same aircraft at the Omaha airport and ascend into the air and continue the scheduled flight through the air to the scheduled destinations in other states. There are fourteen of such flights in and out of Omaha each day. Plaintiff's aircraft move in a continuous circuit, so to speak, with planes moving in and out of the circuit from the overhaul base in Minnesota, there being constantly in use in the circuit all of plaintiff's aircraft [fol. 17] which are not at the overhaul base; notwithstanding the fact that a particular plane may, during the course of its flight in the circuit, be given one or more flight numbers and thus a given flight be spoken of as originating and terminating at specified cities.

3. Since July 15, 1951, the plaintiff has been authorized by the Civil Aeronautics Administration of the United States, for a trial period of three years, to land at the air-

port at Lincoln, Nebraska, on two southbound flights through Omaha while en route to Missouri and points beyond, and on two flights from Missouri while en route to Omaha and points in other states to the north. Consequently, persons and property may be loaded on such flights at Omaha for Lincoln and at Lincoln for Omaha.

4. Mid-Continent Airlines and Braniff Airways, Incorporated, which were consolidated effective about August 1, 1953, operates 7,336 unduplicated route miles over the air lanes, serving sixty communities in the United States plus Latin American and Mexican routes.

5. The plaintiff operates fourteen flights through Omaha, Nebraska, as above stated, as follows:

[fol. 18] Mid-Continent Airlines, Incorporated

Flight Data

Listed below are all the scheduled flights of Mid-Continent Airlines as operated through Omaha, Nebraska. This data gives the originating station of each flight and the arrival and departure times into and out of Omaha, Nebraska, showing the next scheduled stop beyond Omaha, Nebraska.

These flights are separated into southbound and northbound flights.

Southbound

Flight Number

- 23 Originates in Omaha, Nebraska, 7:00 am, arriving Lincoln, Nebraska, 7:27 am, flying non-stop to St. Joseph, Missouri, then to Kansas City, Missouri and St. Louis, Missouri. Equipment used on this flight leaves Minneapolis/St. Paul, Minnesota, 7:00 pm the evening before and arrives in Omaha, Nebraska, 9:55 pm, after scheduled stops in Sioux Falls, South Dakota and Sioux City, Iowa.
- 395 Originates in Minneapolis/St. Paul, Minnesota, 7:25 am, making scheduled stops at Sioux Falls, South Dakota and Sioux City, Iowa, arriving in Omaha, Nebraska at 9:47 am. This flight leaves Omaha 10:07 am, flying non-stop to Kansas City, Missouri, then to Tulsa, Oklahoma and Houston, Texas.

Flight Number

- 39 Originates in Minneapolis/St. Paul, Minnesota, 11:30 am, with scheduled stops in Sioux Falls, South Dakota and Sioux City, Iowa, and arrives in Omaha, Nebraska, 2:25 pm. This flight leaves Omaha 2:40 pm, flying non-stop to St. Joseph, Missouri and then to Kansas City, Missouri.
- 97 Originates in Minneapolis/St. Paul, Minnesota, 2:30 pm, flying non-stop to Omaha, Nebraska, arriving 4:14 pm. This flight leaves Omaha 4:29 pm, flying non-stop to Kansas City, Missouri and to Houston, Texas.
- 9 Originates in Minneapolis/St. Paul, 4:15 pm, with scheduled stops at Watertown, Huron, and Sioux Falls, South Dakota; and Sioux City, Iowa, and arrives in Omaha, Nebraska, 8:37 pm. This flight departs from Omaha 8:52 pm and arrives in Lincoln, Nebraska, 9:19 pm, leaving Lincoln, 9:24 pm, flying non-stop to Kansas City, Missouri.
- 319 Originates in Minneapolis/St. Paul 8:50 pm, flying non-stop to Omaha, Nebraska, arriving 10:09 pm. This flight leaves Omaha 10:29 pm, flying non-stop to Kansas City, Missouri.

Northbound

- 16 Originates in Kansas City, Missouri, 7:40 am, flying non-stop to Omaha, Nebraska, arriving 8:45 am. This flight leaves Omaha 9:00 am, flies non-stop to Sioux City, Iowa, and then to Sioux Falls, Huron and Watertown, South Dakota; and terminates in Minneapolis/St. Paul, Minnesota.
- 18 Originates in Kansas City, Missouri, 9:15 am, flying non-stop to Omaha, Nebraska, arriving in Omaha 10:20 am. This flight leaves Omaha 10:35 am, flying non-stop to Minneapolis/St. Paul, Minnesota.

[fol. 19] Flight Number

- 4 Originates in Kansas City, Missouri, 12:15 pm, stopping in St. Joseph, Missouri, arriving in Lincoln, Nebraska, 1:36 pm. This flight leaves Lincoln 1:41 pm, arriving in Omaha 2:08 pm. This flight leaves Omaha 2:23 pm, flying non-stop to Sioux City, Iowa.

Flight Number

- 302 Originates in Kansas City, Missouri, 2:45 pm, flying non-stop to Omaha, arriving 3:35 pm. This flight leaves Omaha, 3:50 pm and flies non-stop to Minneapolis/St. Paul, Minnesota.
- 38 Originates in St. Louis, Missouri, 3:30 pm after stopping in Kansas City, Missouri and St. Joseph, Missouri, it arrives in Lincoln, Nebraska 6:41 pm. This flight leaves Lincoln 6:46 pm, and arrives in Omaha, 7:13 pm. This flight leaves Omaha 7:28 pm, flies non-stop to Sioux City, Iowa and then to Sioux Falls, South Dakota, and Minneapolis/St. Paul, Minnesota.
- 300 Originates in Kansas City, Missouri, 5:30 pm, and flies non-stop to Omaha, Nebraska, arriving 6:20 pm. This flight leaves Omaha, Nebraska 6:40 pm, flying non-stop to Minneapolis/St. Paul, Minnesota.
- 322 Originates in Kansas City, Missouri, 9:45 pm, flying non-stop to Omaha, Nebraska, arriving 10:35 pm. This flight leaves Omaha, 10:55 pm, flying non-stop to Sioux City, Iowa and Sioux Falls, South Dakota and then on to Minneapolis/St. Paul, Minnesota.

Daily Aircraft Time in Nebraska as Compared with Total System Aircraft Time

		Nebraska Time		Total
	Flight No.	Air	Ground	
1.	Southbound 23	1:09	:05	1:14
2.	395		:20	:20
3.	39		:15	:15
4.	97		:15	:15
5.	9	1:09	:20	1:29
6.	319		:20	:20
7.	7		9:05	9:05
8.	Northbound 16		:15	:15
9.	18		:15	:15
10.	4	1:09	:20	1:29
11.	302		:20	:20
12.	38	1:09	:20	1:29
13.	300		:20	:20
14.	322		:20	:20
Total		4:36	12:50	17:26
System Total (27 x 24:00)				648:00
Ratio—Nebraska to System				2.70%
Eight aircraft operate the above schedules in normal rotation.				

[fol. 20] 6. Miles traveled by passengers originating and terminating in Nebraska compared with system passenger miles—July 15, 1951, to January 31, 1952:

Passenger Miles of Passengers Originating and Terminating in Nebraska	Passenger Miles Mid-Continent System	Ratio of Nebraska to System
39,215	84,605,029	.046%

7. Revenue derived from passengers originating and terminating in Nebraska as compared with system passenger revenue—July 15, 1951, to January 31, 1952:

Passenger Revenue of Passengers Originating and Terminating in Nebraska	Passenger Revenue Mid-Continent System	Ratio of Within Nebraska Income to System Income
\$2,404.68	\$4,750,440.09	.051%

8. The mileage is ninety miles from Lincoln, Nebraska, to the state's border near Rulo, Nebraska, and it takes forty-two minutes to fly that distance. There are four such flights daily. Most of the flights being those in and out of Omaha, Nebraska, take off and enter the state in a matter of seconds because the Omaha airport adjoins the Missouri River, which is the state boundary, and the flights come over the river and go out over the river to and from other states, except the flights above described to Lincoln since July 15, 1951. Each aircraft is on the ground at the airport to load and unload passengers and freight from five to twenty minutes, except the one flight per day leaving Minneapolis at 7:00 p.m., arriving in Omaha at 9:55 p.m., leaving Omaha at 7:00 a.m., arriving in Lincoln at 7:27 a.m., and from there the plane goes to points in Missouri and south in interstate commerce.

Summary of Carriage of Persons and Property between Lincoln and Omaha, Nebraska

July 15, 1951, to January 31, 1952

	Mail Pounds	Express Pounds	Freight Pounds	Number of Passengers
In Nebraska ..	11,906	5,319	4,864	713
System total ..	2,084,447	1,362,379	1,946,824	263,075
Ratio571%	.390%	.250%	.271%

[fol. 21] 9. Plaintiff's main executive offices were in Kansas City, Missouri, and are now in Dallas, Texas, owing to a consolidation of Mid-Continent Airlines, Inc., with Braniff Airways, Incorporated, which took place on or about August 1, 1952. Braniff Airways is a corporation organized and existing under the laws of the State of Oklahoma with its corporate place of business at Oklahoma City in said state and with its main executive offices at Dallas, Texas, and is organized for the same objects and purposes as plaintiff. Accordingly, the caption in this cause shall be "Mid-Continent Airlines, Inc., now Braniff Airways, Incorporated," versus the defendants named. The defendants as named in the caption are the proper party defendants in this action.

10. The home port of plaintiff is and at all times mentioned herein has been at the Minneapolis-St. Paul airport, known as the Wold-Chamberlain Air Field, where plaintiff maintains repair shops, machinery, equipment, and hangars. To this port each of the aircraft, with all its flight equipment that alights from the air above Nebraska and ascends into the air from Nebraska, must be flown at designated times for governmental inspection, repairs, maintenance, tests, overhauling, and storage when not in use. None of such home port facilities were or are located in Nebraska. All aircraft of plaintiff must be returned to said home port at Minneapolis-St. Paul for governmental inspection and overhauling and relicensing before a period of fifty hours has expired on the engines and plane under the Civil Aeronautics Administration rules, under the authority of the Civil Aeronautics Code (49 USCA Ch. 9, §401-705).

11. The plaintiff's aircraft are flown through the air within the limits of aerial highways, specifically described and assigned by the United States Civil Aeronautics Administration to the plaintiff. Said aerial space is so described and outlined by said Administration as the fixed air lanes in which plaintiff's ships are required to fly when going from state to state into and from Nebraska. Said Administration issues, upon examination, the licenses for the aircraft, its engines, propellers, and all its flight equipment, including radio and all communica-

[fol. 22]

tion devices from and to the aircraft. Likewise, the Administration licenses the pilots and all personnel engaged in flight. All aircraft, engines, radio, communication apparatus, and flight equipment must fly to the Minneapolis-St. Paul home port of plaintiff, where all are located.

12. At the Omaha Municipal Airport the federal government, acting through said Administration, has constructed and maintains an airport traffic control tower at which there is stationed a chief airport controller and eleven assistants, all of whom are employed and paid by the United States at a payroll expense of about \$50,000 per year. This personnel and the equipment used are so stationed for the purpose of directing and controlling aircraft coming into or departing from the Omaha airport. Each aircraft of plaintiff coming into the airport receives, when about ten minutes out from Omaha, preliminary landing instructions, and is told by the government controller which landing runway to use and is given the traffic pattern, or may be instructed not to land. These government aircraft controllers at the Omaha airport are likewise in constant communication with other major aircraft control towers spaced throughout the parts of the United States directing flight in the air lanes through which plaintiff's planes are licensed and restricted to fly and from which they may descend and ascend in pursuance of their government licensed course and government approved schedules. These federal air lanes are laid out across the country and normally connect major air terminals. These air lanes are approximately ten miles wide and are established north, south, east, and west. Each air carrier has been granted certain priority authority. Radio facilities are provided by the government along these air lanes to direct all air traffic from one point to another. For planes not equipped with radio, the government provides and operates a radio beam. Also about each twenty miles on the ground are electrically operated beacons indicating that the designated air lane is above that light.

[fol. 23] 13. All violations of rules and regulations of the Civil Aeronautics Administration or of the Civil Aeronautics Code may be reported to the Administration by any person concerned. Violations of landing and take-off

regulations at an airport in Nebraska or elsewhere are by law federal offenses under the Civil Aeronautics Code. Such violations are punishable as by the law provided in the federal courts. (49 USCA §560, 610(a), 623; 61.306, 60.18(c), of Civil Air Regulations)

14. The plaintiff's aircraft, which land from the air lanes above and take off into them from the Nebraska airports, are each engaged as federally licensed air carriers of mail, persons, and property between the States of North Dakota, Minnesota, South Dakota, Iowa, Wisconsin, Illinois, Nebraska, Colorado, Missouri, Oklahoma, Arkansas, Tennessee, Louisiana, Texas, and now Mexico and South America.

15. At the close of the year 1951 the total operating revenue of plaintiff (Mid-Continent) was \$9,818,363. Total operating expense was \$9,508,859. Net profit after taxes was \$135,941. The revenue miles flown were 9,556,459. The revenue passengers carried were 441,115. The pounds of mail and cargo carried were 10,200,000.

16. The gross income from passengers for 1951 was \$7,681,760.80; from mail, \$1,608,590.65; from freight, express, and excess baggage, \$331,261.23; from chartered planes and other transportation, \$171,037.96; and from miscellaneous sources, \$25,712.68. Total for 1951, \$9,818,363.32.

17. Capitalization (Mid-Continent): Common stock issued and outstanding, 418,755 shares par value \$1.00; debentures due May 1, 1954, \$50,000; May 1, 1959, \$100,000; May 1, 1962, \$150,000; May 1, 1963, \$1,000,000.

18. Plaintiff pays approximately \$22,000 per year for depot rental space, landing fees, and other facilities at the Municipal Airport in Omaha.

19. In addition to the \$22,000 per year, the plaintiff pays two and a half cents per gallon tax on gasoline fuel supplied [fol. 24] to its aircraft at Omaha. In 1951 567,000 gallons were taken on in Omaha, resulting in a net tax to the State of Nebraska of \$14,180.00.

20. The personal property of plaintiff, such as office furniture and equipment, auto trucks, and all similar property, is taxed in Douglas County. Also such property would be taxed in Lancaster County, if any such property

is there located. In Douglas County this tax is \$200 to \$300 per year. Comparable amounts are paid in other municipalities in other states where the aircraft land and take off.

21. In a return made by plaintiff to the defendant Board for taxation for 1950, 9% of the total was given as the proper per cent of revenue originating in Nebraska based on ticket sales, and $11\frac{1}{2}\%$ of the total system tonnage originated in Nebraska for 1950.

22. The plaintiff made out and filed its return under forms furnished by the defendant Tax Commissioner for 1950, and the assessment was as follows. The Mid-Continent Airlines assessment for 1950 was compiled by the defendant Tax Commissioner from forms filled out, signed, and returned by the plaintiff. The tax for 1950 was \$4,280.44, and it remains unpaid. The defendants fixed as the valuation figure \$118,901.00 for plaintiff's flight equipment for Nebraska. The rate of levy was 36 mills, resulting in the tax of \$4,280.44 for 1950. The valuation was determined by the Tax Commissioner as follows.

[fol. 25] Airline Assessments 1950

Mid Continent Airlines

1. System Value Formula

A. Five Year Average Net Operating Income Capitalized at 6%	\$5,484,350
B. Five Year Ave. Mkt. Value of Stocks and Bonds	3,927,634
C. Book Value Depreciated Cost Basis	707,864
Average of A, B and C or System Value ..	3,373,283

2. Flight Equipment Apportionment Formula

A. Ratio of Flight Equipment Cost (Sec. B) to Total Operating Prop- erty Cost (Sec. F)	1,771,360	61.1%
	<hr/>	
	2,899,660	

B. Ratio of Depreciated Cost Value of Flight Equipment (Sec. C) to Depreciated Cost Value of Total Operating Property (Sec. F)			237,322	33.5%
			<hr/> 707,864	-
Average of A and B or Apportionment Factor				47.3%
3. Allocation Formula				
A. Ratio of Arrivals and Departures within Nebraska to Total Arrivals and Departures			10,306	9.032
			<hr/> 114,104	
B. Ratio of Revenue Tons Handled in Nebraska to Total Revenue Tons Handled			8,008	11.541
			<hr/> 69,389	
C. Ratio of Revenue Originating within Nebraska to Total Revenue			537,894	9.235
			<hr/> 5,824,803	
Average of A, B and C or Allocation Factor				9.936
4. Allocated Value (Result of System Value \times Apportionment Factor \times Allocation Factor)				
$3,373,283 \times 47.3 = 1,595,563 \times 9.936 = 158,535$				
5. Equalized value				
$158,535 \times 75\% = \$118,901$				

[fol. 26] 23. For the year 1951 the plaintiff failed to file the return, and defendants accordingly used the same ratio formulae for 1951 as returned for 1950, changing only the mill levy from 36 to 38, which was the average levy throughout the whole state for 1951. The mill levy is obtained by the defendants' computing the total amount of property taxes levied in the state and dividing that total by the total assessed valuation of property for the state, and that re-

sulted in the mill levy of 36 and 38, respectively, for 1950 and 1951. For the year 1951 the tax assessed was \$4,518.29 which remains unpaid. These taxes are drawing interest and penalties as by law provided.

24. The tax in question is assessed only against regularly scheduled air carriers upon their flight equipment, which is the fully equipped airplane, operating from without the State of Nebraska and into and out of Nebraska, and is not applied to carriers who operate only intermittently in the State of Nebraska in flights from and back to a fixed base in Nebraska. Such planes are assessed by the local county assessors in the county in which the base is located.

25. The State Tax Commissioner, in assessing plaintiff's aircraft and arriving at the ratios and the resulting tax, followed the state statutes which the Attorney General advised were applicable, and used the unit rule to arrive at the whole system value, and then used the statutory ratios to determine the valuations for Nebraska. It is these sections of the Nebraska law that are now under attack as unconstitutional under the Federal Constitution, as set forth in the petition on file herein. The defendants' position is made clear by their answer on file herein. The taxing statutes in question are copied herein as follows:

[fol. 27]

Chapter 77

Revenue and Taxation

RSN 1943, Reissue of 1950

77-1244. *Personal property; taxation of air transportation carriers; definitions.* As used in sections 77-1244 to 77-1246:

(1) The term "air carrier" means any person, firm, partnership, corporation, association, trustee, receiver, or assignee, and all other persons, whether or not in a representative capacity, undertaking to engage in the carriage of persons or cargo for hire by aircraft; any air carrier as herein defined, engaged solely in intrastate transportation, whose flight equipment is based at only one airport within the state, shall be excepted from taxation under this sec-

tion, but shall be subject to taxation in the same manner as other locally assessed property;

(2) The term "aircraft arrivals and departures" means (a) the number of scheduled landings and takeoffs of the aircraft of an air carrier, (b) the number of scheduled air pickups and deliveries by the aircraft of such carrier, and (c) in the case of nonscheduled operations, shall include all landings and takeoffs, pickups and deliveries;

(3) The term "flight equipment" means aircraft fully equipped for flight and used within the continental limits of the United States.

(4) The term "originating revenue" means revenue to an air carrier from the transportation of revenue passengers and revenue cargo exclusive of the revenue derived from the transportation of express or mail; and

(5) The term "revenue tons handled" by an air carrier means the weight in tons of revenue passengers and revenue cargo received and discharged as originating or terminating traffic.

Source: Laws 1947, c. 266, § 1, p. 858; Laws 1949, c. 231, § 5, p. 641.

77-1245. *Personal property; taxation of air transportation carriers; assessment; collection.* Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios; (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and

(3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period.

Source: Laws 1947, c. 266, § 2, p. 859.

77-1246. *Personal property; taxation of air transportation; laws applicable.* Real property and personal property, except flight equipment, of an air carrier shall be taxed in accordance with the applicable laws of this state.

Source: Laws 1947, c. 266, § 3, p. 860.

77-1247. *Personal property taxation of air transportation carriers; annual report; contents.* Each air carrier, as defined in section 77-1244, shall on or before June 1 in each year make to the Tax Commissioner, containing the information necessary to determine the value of its flight equipment and the proportion allocated to this state for purposes of taxation.

Source: Laws 1949, c. 231, § 1, p. 641.

[fol. 28] 77-1248. *Personal property; taxation of air transportation carriers; Tax Commissioner; report to State Board of Equalization and Assessment.* The Tax Commissioner shall ascertain from the reports made, and from any other information obtained by him, the value of flight equipment of air carriers and the proportion allocated to this state for the purposes of taxation, as provided in section 77-1245, and shall make a report thereof to the State Board of Equalization and Assessment as to each air carrier.

Source: Laws 1949 c. 231, § 2, p. 641.

77-1249. *Personal property; taxation of air transportation carriers; State Board of Equalization and Assessment; levy.* The State Board of Equalization and Assessment shall each year make a levy for purposes of taxation against the value so ascertained and determined by the Tax Commissioner, as provided in section 77-1248, at a rate which shall be equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local,

levied throughout the several taxing districts of the state for the preceding year.

Source: Laws 1949, c. 231, § 3, p. 641.

77-1250. *Personal property; taxation of air transportation carriers; levy; collection; payment.* When levied, the tax shall be collected and paid in the same manner as the tax on car companies as provided in sections 77-629 to 77-631.

Source: Laws 1949, c. 231, § 4, p. 641.

[fols. 29-30] 26. The tax collected from air carriers flying in and out of Nebraska under the act is used for the general expenditures of the state. In making the levy based upon the valuations and ratios above set forth, no ratio is determined by the defendants of intrastate to interstate business carried on by the plaintiff in Nebraska.

27. The rate of tax levy imposed upon plaintiff's flight equipment, pursuant to the legislative enactment here in question, is equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.

Dated at Omaha, Nebraska, February 24, 1953.

Mid-Continent Airlines, Inc., a Corporation, Plaintiff, By (S.) William J. Hotz, Hotz & Hotz, Its Attorneys, 1530-5 City National Bank Building, Omaha 2, Nebraska.

Dated at Lincoln, Nebraska, February 26, 1953.

Nebraska State Board of Equalization and Assessment, et al., Defendants, By Clarence S. Beck, Attorney General. By (S.) C. C. Sheldon, Assistant Attorney General.

[fols. 31-32] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

STIPULATION RE SUBSTITUTION OF PARTIES—April 24-25, 1953

It is hereby stipulated and agreed that since the start of these proceedings by application to file original petition in this Court, in pursuance of which the petition was filed July 15, 1952, and in which the persons named in the caption were made defendants, there has been a change in the state offices of said officials, as follows:

1. Robert B. Crosby is now Governor instead of Val Peterson.
2. Frank Marsh is Secretary of State instead of James S. Pittenger.
3. Norris J. Anderson is Nebraska State Tax Commissioner instead of Philip K. Johnson.

In consequence thereof, the parties hereto stipulate and agree that in the listing of the defendants in these proceedings, the names of the present incumbents of the above-designated state officials, as members of the defendant Nebraska State Board of Equalization and Assessment, shall be substituted without further consent or notification, it being the intention that this stipulation shall govern said matter of substitution.

Dated April 24, 1953.

Mid-Continent Airlines, Inc., now Braniff Airways, Incorporated, Plaintiff, By (S.) Wm. J. Hotz, of Hotz & Hotz, Its Attorneys, 1530-5 City National Bank Building, Omaha, Nebraska.

Dated April 25, 1953.

Nebraska State Board of Equalization and Assessment, et al., Defendants, By Clarence S. Beck, Attorney General, By (S.) C. C. Sheldon, Asst. Attorney General, Its Attorneys.

[fols. 33-34] SUPREME COURT OF NEBRASKA, JANUARY TERM,
A. D. 1953.

MID-CONTINENT AIRLINES, INC., a corporation, Plaintiff

v.

NEBRASKA STATE BOARD OF EQUALIZATION & ASSESSMENT
et al., Defendants

Original. No. 33260

JUDGMENT—July 17, 1953

This cause coming on to be heard upon petition of plaintiff, the answer of defendants thereto, briefs and argument of counsel, was submitted to the court; upon due consideration whereof, the court finds that Sections 77-1244 to 77-1250, Revised Statutes of Nebraska, 1943, are not violative of Article I, section 8, clause 3, Article I, section 9, clause 6, or Article I, section 10, clause 3, of the Constitution of the United States on the basis here challenged and that the petition of plaintiff should be dismissed. It is, therefore, considered, ordered and adjudged that the petition of plaintiff be, and it hereby is, dismissed at the cost of plaintiff, taxed at \$——; for all of which execution is hereby awarded.

[fol. 35] IN SUPREME COURT OF NEBRASKA

MID-CONTINENT AIRLINES, INC.

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT

OPINION—Filed July 17, 1953

1. Statutes providing for the levy of an ad valorem personal property tax on flight equipment used in interstate commerce, when such flight equipment is wholly and continuously outside of the state of the owner's domicile during the tax year, is not violative of the Commerce Clause of the Constitution of the United States when such tax

bears a fair and reasonable relation to the use of the property in the taxing state.

2. Sections 77-1244 to 77-1250, R. R. S. 1943, on the grounds here challenged, held not violative of Article I, section 9, clause 6, Article I, section 10, clause 3, or Article I, section 8, clause 3, of the Constitution of the United States.

[fol. 36] Heard before Simmons, C. J., Carter, Messmore, Yeager, Chappell, Wenke, and Boslaugh, JJ. Carter, J.

This is an original action for a declaratory judgment commenced in this court to test the validity of sections 77-1244 to 77-1250, R. R. S. 1943. Such sections of the statutes authorize the assessment, levy, and collection of an ad valorem personal property tax against plaintiff's flight equipment used in interstate commerce. Plaintiff contends that such taxation violates Article I, section 8, clause 3, of the Constitution of the United States, commonly referred to as the Commerce Clause. The defendants deny the unconstitutionality of the Nebraska act and assert the right to impose an ad valorem personal property tax upon plaintiff's flight equipment which is used within the state as a part of a system of interstate air commerce over fixed routes on regular schedules, so long as the allocation of the proportionate part of the property value and the levy thereon bear a fair and reasonable relation to the use of such flight equipment within the state. Briefly this constitutes the issue before the court.

Plaintiff is a corporation organized and existing under [fol. 37] the laws of the State of Delaware with its corporate place of business at Wilmington in that state. The main executive offices of the plaintiff were in Kansas City, Missouri, until the consolidation of plaintiff with the Braniff Airways, Incorporated, was effected on or about August 1, 1952, at which time such offices were moved to Dallas, Texas. It is stipulated that Braniff Airways, Incorporated, is substituted for Mid-Continent Airlines, Incorporated, as the party plaintiff. The home port to which all its fleet of planes must return is Minneapolis and St. Paul, Minnesota. Plaintiff is licensed by the Civil Aeronautics Board of the United States to engage in interstate

transportation by air for hire under the provisions of Title 49, U.S.C.A., sections 401 to 705. Pursuant to such authority it operates a large number of aircraft upon regular schedules in trunk line flight from Minot, North Dakota, to New Orleans, Louisiana, making regular landings in North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Illinois, Kansas, Missouri, Oklahoma, Arkansas, Texas, and Louisiana. No planes land in plaintiff's domiciliary state of Delaware. Plaintiff operates over 7,336 of unduplicated route miles. Plaintiff's activities in Nebraska consist of making landings at Omaha and Lincoln on regularly [fol.38] scheduled stops on interstate flights. There are 14 of such flights in and out of Omaha each day and 4 such flights in and out of Lincoln. These stops are made to handle mail, express, freight, and passengers and are usually of short duration, generally from 5 to 20 minutes. The home port for all planes here involved is the Wold-Chamberlain Air Field at St. Paul, Minnesota, where hangars, repair shops, and equipment are maintained. Municipal and federal government facilities are used at Omaha and Lincoln. The flight distance from Omaha to Lincoln is 60 miles and from Lincoln to Rulo it is 90 miles, these being the only routes traveled by any of plaintiff's planes in Nebraska within the limits of aerial routes specifically assigned by the Civil Aeronautics Administration. It is not disputed that plaintiff's operations are interstate in character and are subject to regulation by the federal government as an interstate common carrier. The gross income of plaintiff for 1951 was \$9,818,363, and the net profit was \$135,941. The income from the carriage of passengers, mail, freight, express, excess baggage, chartered planes, and miscellaneous sources is set forth in the record [fol.39] by stipulation. Plaintiff pays for depot rental space at Omaha in the amount of \$22,000 a year, and a tax of 2½ cents a gallon on gasoline used which amounted to \$14,180 in 1951. The tax levied in 1950 was \$4,280.44, and in 1951 it was \$4,518.29.

The formula for the assessment of the tax on flight equipment, defined in the statute as aircraft fully equipped for flight and used within the continental limits of the United

States, is set forth in section 77-1245, R. R. S. 1943, as follows: "Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such [fol. 40] air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period." It is the contention of the plaintiff that the taxing of its flight equipment is prohibited by the Commerce Clause in any amount whatsoever. The question to be determined, therefore, is whether or not the levy of any ad valorem personal property tax on the flight equipment of the defendant on an allocation basis contravenes the Commerce Clause of the Constitution of the United States.

In *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S. Ct. 950, 88 L. Ed. 1283, 153 A.L.R. 245, the court dealt with the taxation of airplanes by the State of Minnesota which were engaged in interstate commerce. The plaintiff was a Minnesota corporation, its principal place of business was in St. Paul, Minnesota, and the latter city was the home port of all its planes. All of its planes were continuously engaged in flying from state to state as interstate car- [fol. 41] riers except when laid up for repairs. The taxing authorities of Minnesota assessed a tax on the full value of the entire fleet of planes belonging to the plaintiff which

came into the state. In upholding the tax on the full value of all of the planes of Northwest Airlines in Minnesota, the court said: "Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the 'home port' of all its planes. The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. See *State Tax Comm'n v. Aldrich*, 316 U. S. 174, 180. No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which [fol.42] gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature and the practical consequence of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personality which is permanently attributable to Minnesota and to no other State." In so holding the court specifically stated that the taxability of any part of this fleet by any other state than Minnesota, in view of the taxability of the entire fleet by that state, was not before, or decided by, the court. It was on this latter point that differences arose over the proper disposition of the case. Interstate commerce may be required, of course, to pay its fair share of the property tax burden which the states, in which the interstate business is done, may lawfully impose generally on property located in them. In other words, interstate commerce bears no undue part of the burden if the personal property tax imposed by a given state is exclusive of all other property taxes assessed by other states, or, what is

more material to the case before us, if the tax on its personal property regularly used over fixed routes in [fol. 43] interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state. The failure of the court in the Northwest Airlines case to decide whether or not the factors set forth, which permitted full taxation in Minnesota, had the corresponding effect of preventing any taxation in any other state where interstate business was transacted by Northwest Airlines by means of the fleet of planes there involved, was the cause of the major division of the court on the issues involved. The majority to be consistent would necessarily be required to deny the right of taxation to other states in which Northwest Airlines planes engage in interstate business, or depart from the court's numerous holdings that multiple taxation of property used in interstate commerce constitutes an unlawful burden thereon in compelling the carrier to pay the taxing states more than its fair share of taxes measured by the full value of the property. It is axiomatic, we think, that if one state may properly tax the full value of the property, other taxes levied by other states would be a multiple taxation of the property constituting an unconstitutional burden upon interstate commerce.

The essential facts in the present case do not bring it [fol. 44] within any announced rules that would permit any one state to levy an ad valorem personal property tax for the full value of the planes involved. In the present case the corporation domicile is in Delaware, its general offices in Texas, and the home port of the planes in Minnesota. Under such a division of the factors announced and considered in the Northwest Airlines case we cannot say that the fleet of planes in the case at bar has any taxable situs in any one state where the full value of such planes could be taxed. Under such a situation we think the Northwest Airlines case leaves the door open for a decision on the issue as to whether or not, in a case such as we have here in which no state has a right to tax the fleet at full value, each state through which the planes land and engage in interstate business may tax a part of

their value, if it is fairly related to their use within the taxing state. The overall result of the Northwest Airlines case is that where the owner of a fleet of airplanes engaged in interstate commerce is a corporation of the state levying the tax with its principal place of business and the home port of all its planes within the same state, such state may tax the full value of the planes. Whether or not the taxing of the whole value in such state operates to exempt [fol. 45] them from taxation in other states in which they engage in interstate business is specifically reserved by the opinion and casts serious doubt on the right of other states to do so unless, possibly, evidence of a tax situs in other states would have called for a different result. In any event, the authority of Minnesota to tax the full value of the fleet of planes rests upon the express presumption that in flying in interstate commerce on regular schedules through several states they had not acquired a permanent taxable status elsewhere, although some of them had actually been taxed in other states. Whether this means the result would have been different if it had been shown that there was a taxable situs in other states, or, whether it means that multiple taxation of tangible property is to be allowed even though the aggregate assessment exceeds the full value of the property, remains unanswered. We assume the former, in view of the many holdings of the United States Supreme Court relative to multiple assessments on property in interstate commerce which exceed the full value of the property as being an undue burden under the Commerce Clause.

In the later case of *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585, [fol. 46] the court sustained an apportioned ad valorem personal tax levy by the nondomiciliary state of Louisiana upon a fleet of vessels engaged in interstate commerce in inland waters. The facts show that the vessels in question came into New Orleans where they were left for unloading and reloading. They were then moved to ports outside the state. They were operated on no fixed schedule but the turn-arounds were made as quickly as possible. They remained only long enough to unload and take on cargo and to make necessary and temporary repairs. The

State of Louisiana and the city of New Orleans levied ad valorem taxes on assessments based on the ratio between the total number of miles of lines in Louisiana and the total number of miles of all of the carrier's lines. In upholding the tax the court said: "It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders. * * * We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises." Paraphrasing the latter statement, "We can see no reason which should put air transportation on a different constitutional footing than other interstate enterprises."

[fol. 47] In the subsequent case of *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427, 26 A.L.R. 2d 1371, the principle that vessels moving on inland waters in interstate commerce could be taxed by a state through which they passed on the basis of that portion of the value of the vessels represented by the ratio between the total number of miles in the taxing state and the total number of miles in the entire operation is adhered to as a proper method of tax allocation. The *Peck* case distinguishes *Northwest Airlines, Inc. v. Minnesota*, *supra*, on the basis that it was not shown in the latter case that "a defined part of the domiciliary corpus' had acquired a taxable situs elsewhere." The further statement in the *Peck* case to the effect that "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile", appears to sustain an allocation tax in a case such as we have before us in which no part of the property taxed was in the domiciliary state during the tax year. The holding in the *Northwest Airlines* case that the tax in that case on the full value of the air fleet was valid is based on a premise that is wholly absent in the present one.

[fol. 48] The case relied upon the most to sustain the allocation theory of taxing personal property used in interstate commerce is *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613. It involved a tax on Pullman cars that were continuously moving in

and out of the State of Pennsylvania. The fundamental concepts which support the allocation theory of taxing personal property used in interstate commerce are set forth in this case. The legal fiction that all personal property has its situs at the owner's domicile is abandoned, and the system of taxing it at the place at which it is used and by whose laws it is protected, when it is employed in a business requiring continuous and constant movement from one state to another, is plainly and definitely announced. That this case is relied upon in the *Ott and Peck* cases is clear. For reasons stated in the *Pullman's Palace Car Company* case, we think the inland water transportation cases are particularly applicable. The court in the *Pullman* case said: "No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation [fol. 49] requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse." Air transportation likewise requires no artificial roadways other than port facilities. The rule as to one would appear to be fully applicable to the other.

The plaintiff relies primarily upon the following cases to sustain its position. *Gibbons v. Ogden*, 9 Wheaton 1, 6 L. Ed. 23; *Smith v. Turner*, 7 Howard 282, 12 L. Ed. 702; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; *New York Central & H. R. R. Co. v. Miller*, 202 U. S. 584, 26 S. Ct. 714, 50 L. Ed. 1155; *Union Tank Car Co. v. McKnight*, 84 F. 2d 421; *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238; *City of Chicago v. Willett Co.*, 344 U. S. 574, 73 S. Ct. 460, 97 L. Ed. 333. We do not consider these cases controlling in the issue before us. A careful reading of some of them, however, indicates that they support the theory of the defendant. Some announce principles which have been abandoned in the natural course of change in our economic and [fol. 50] transportation systems. Others are based on

facts which clearly distinguish them from the present case while others involve a tax in no way resembling an ad valorem tax on personal property. The plaintiff also cites *Pullman's Palace Car Co. v. Pennsylvania*, *supra*, *Ott v. Mississippi Valley Barge Line Co.*, *supra*, *Northwest Airlines, Inc. v. Minnesota*, *supra*, and *Standard Oil Co. v. Peck*, *supra*, which in our opinion definitely sustain the position of the defendant as we have heretofore stated.

It seems clear, therefore, that Nebraska and other similarly situated states have the power to impose an apportioned ad valorem personal property tax upon the flight equipment of this plaintiff, which is engaged in interstate commerce within the taxing state, when it has been wholly and continuously outside the state of the owner's domicile, and the assessed value of the property bears a fair and reasonable relation to the use made of it in such taxing state.

The petition alleges also that the statutes in question are unconstitutional in that they violate Article I, section 9, clause 6, and Article I, section 10, clause 3, of the Constitution of the United States. These questions appear to have been abandoned in the brief and oral argument. We hold, however, that the foregoing constitutional [fol. 51] provisions were not violated on the basis of the authorities cited dealing with the alleged violation of Article I, section 8, clause 3, of the Constitution of the United States.

The foregoing disposes of the only question raised by the petition. Plaintiff in its brief states: "Plaintiff contends such taxation by defendants is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, which vests in Congress the exclusive right to regulate commerce among the states, and the levy of such tax by the defendants constitutes regulation. No state constitutional question or other legal issue is presented for the Court's decision." We consequently limit the issue strictly to that raised by the petition. The plaintiff does not allege that the formula set forth in the statute produces an assessed value that does not bear a fair and reasonable relation to the use of the property within this state. That issue was not alleged, briefed, or argued by the plaintiff.

We do not deem this issue to be before the court for its determination.

We find that the act is not violative of Article I, section 8, clause 3, Article I, section 9, clause 6, or Article I, [fols. 52-53] section 10, clause 3, of the Constitution of the United States, on the basis on which it is here challenged. The petition of the plaintiff is therefore dismissed.

Dismissed.

[fols. 54-55] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

BRANIFF AIRWAYS, INCORPORATED, Plaintiff-Appellant

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT;
NORRIS J. ANDERSON, Nebraska State Tax Commissioner;
ROBERT B. CROSBY, Governor of Nebraska; FRANK MARSH,
Secretary of State of Nebraska; RAY C. JOHNSON, State
Auditor; FRANK B. HEINTZE, Treasurer of Nebraska;
and CLARENCE S. BECK, Attorney General of Nebraska,
Defendants-Appellees

PETITION FOR APPEAL—Filed October 14, 1953

TO: THE HONORABLE ROBERT G. SIMMONS, Chief Justice of
the Supreme Court of Nebraska:

Plaintiff-appellant in the above-entitled cause is aggrieved by the final Opinion, Judgment and Decree of the Supreme Court of the State of Nebraska, filed and entered July 17, 1953, and does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final Opinion, Judgment and Decree and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond pending the final disposition of this appeal; that the amount of security be fixed by the order allowing the application; that the material parts of the record, proceedings, and papers upon which said final Opinion, Judg-

ment and Decree was based, duly authenticated, be sent to the Supreme Court of the United States in Washington, District of Columbia, United States of America, in accordance with the Rules in such cases made and provided.

Dated October 14, 1953.

Respectfully submitted, William J. Hotz, William J. Hotz, Jr., Robert M. Kane, Counsel for Plaintiff-Appellant, Hotz & Hotz, Attorneys at Law, 1530-5 City Natl. Bank Bldg., Omaha, Nebraska.

[fol. 56] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. —

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed
October 14, 1953

Braniff Airways, Incorporated, plaintiff-appellant on this appeal (successor to Mid-Continent Airlines, Inc., Statement of Facts, Appendix C of Jurisdictional Statements), files this Assignment of Errors upon which it bases its prayer for reversal of the Opinion, Judgment and Decree filed and entered by the Supreme Court of Nebraska on July 17, 1953 (Appendix A of Jurisdictional Statement). Said Opinion held valid the Nebraska ad valorem taxing statute (Appendix B of Jurisdictional Statements) designed to assess plaintiff-appellant's aircraft because the aircraft came into Nebraska and departed therefrom while solely engaged in interstate commerce. In consequence thereof, the state statute is repugnant to the Constitution of the United States, Article I, Section 8, Clause 3, and the court below erred in holding the said Nebraska statute valid. This appeal is prosecuted by virtue of Title 28, United States Code, Section 1257(2). Reference is herein made to the Jurisdictional Statements, filed October 14, 1953, and to the said Opinion, set forth therein as Appendix A.

The Supreme Court of Nebraska, in announcing the said opinion filed on July 17, 1953, committed reversible error as follows:

1. The Court erred in holding the Nebraska *ad valorem* taxing statute valid as against appellant's attack under the Commerce Clause, when it appeared that the state [fol. 57] statute in question devised a plan of arriving at the valuation of plaintiff-appellant's aircraft on the basis of the number of stops at the airports in Nebraska and the tonnage and the revenue which the Nebraska operations bore to the total number of stops and total tonnage and revenue of the plaintiff-appellant's entire system. These three factors in no way pertain to the aircraft's attaining a taxable situs, but pertain only to business done as a basis for valuation of the aircraft. It is apparent that the method of arriving at a valuation of the aircraft may be constitutionally valid only if the property sought to be taxed in fact attained a taxable situs within Nebraska.

2. The Court erred in assuming that such essential taxable situs existed as a matter of law solely because the plaintiff-appellant's airplanes came into and departed from Nebraska on regular schedules, stopping from five to twenty minutes each, as shown in the Opinion and the Stipulation of Facts, copies of which are appended to the Jurisdictional Statements as A and C. The Court failed to find and announce that such stops at the airports were essential and necessarily a part of interstate commerce. The Court failed to recognize that such flights from the air and back into the air were wholly disassociated from the concept of the law in reference to obtaining a taxable situs within the state as a base for proportional valuation for the *ad valorem* tax upon plaintiff-appellant's aircraft.

3. The Court erred in concluding in the Opinion that the allocation method of taxation was an acceptable one and applying it, when the Court under the Stipulation of Facts and under its own findings in the Opinion should have concluded as a matter of law that appellant's airplanes could attain no taxable situs within the State of Nebraska by merely landing and taking off while engaged in commerce among the states. The State of Nebraska's taxing power may not legally reach into the airplanes above Nebraska

for the purpose of allocating said lanes as a part of the State's jurisdiction.

[fol. 58] 4. The Court erred in failing to recognize and hold that the Nebraska statutes in question were revenue-producing statutes to raise funds for the general income of the State of Nebraska and in failing to find no reciprocal benefits of sufficient value to justify the ad valorem tax on the basis of benefits received.

5. The Court erred in failing to find and determine that the plaintiff-appellant paid taxes upon all its property, both real and personal, that was grounded or remained within the State of Nebraska for sufficient time to gain a taxable situs. The facts are stipulated in reference to such taxes. They are for depot rental and for the privilege of landing at the Municipal Airport at Omaha, Nebraska, in the amount of \$22,000 a year. These landing charges are based upon the number of landings and weight of the aircraft. The depot rental is based upon a square-foot charge. In addition thereto, plaintiff-appellant pays a tax of $2\frac{1}{2}\text{¢}$ per gallon for all gasoline purchased at the airports in Nebraska. This tax aggregated \$14,180 for the year 1951. These taxes continue and are paid when due. In consequence thereof, the Court erred in failing to find that appellant pays its share of the cost of government in respect to such uses, and does similarly pay for all reciprocal benefits received from the State of Nebraska. The ad valorem tax drawn in question has no basis for the validity found in terms of reciprocal benefits.

6. The Court erred throughout the Opinion in adopting principally the language of the dissenting opinion in the case of *Northwest Air Lines, Inc. v. Minnesota* (1944), 322 U.S. 292, 64 S.Ct. 950, to sustain its views. In so doing the Court overlooked the majority opinion in said case which was based upon the fact that Minneapolis-St. Paul airfield was the "home port" of the appellant in that action, and that Minnesota was the state of that airline's creation. The State of Minnesota was permitted for such two reasons to tax such aircraft as had attained a taxable situs in that state while there for other purposes than flights in and out of that state. The Braniff Airways, Incorporated, is

incorporated under the laws of Oklahoma. Its home port is at the Minneapolis-St. Paul airport, and its main offices at Dallas, Texas. Mid-Continent Airlines was incorporated and based also in other states than Nebraska.

[fol. 59] 7. The Court erred in failing to differentiate and discuss the cases cited in the Opinion on page 434 of 157 Nebraska. The Court summarily dismissed the authority of those cases by stating, "We do not consider these cases control in the issues before us." None of said cases is authority or precedent for holding the Nebraska statutes, herein drawn in question, valid and enforceable as an ad valorem revenue-producing law, when upon the face of the statute it is plain the tax is levied and assessed against the plaintiff-appellant's aircraft which are instrumentalities of interstate commerce and were so engaged when the tax was levied in 1950, 1951, and now in 1952 and 1953, all of which are contested in this action.

8. The Court erred in its failure to recognize as a matter of law that Congress has preempted the field of aviation by the enactment of Chapter 9 of Title 49, U.S.C., to which reference is made in the Jurisdictional Statement wherein the citations are given. Section 403 thereof dedicates and declares to exist for all the citizens of the United States a public right of freedom of transit in air commerce through the navigable air space above the United States. The Supreme Court of Nebraska erred in that it failed to recognize that the air above Nebraska came within that congressional declaration. The Nebraska Court erred when it stated, "The flight distance from Omaha to Lincoln is 60 miles and from Lincoln to Rulo (Nebraska) it is 90 miles," thus giving credence to such distances as if the aircraft were traveling upon the state highways of Nebraska or upon rights-of-way within the Nebraska jurisdiction. By such reference and finding the Court sought to affix land-borne formulae to aircraft flying above the State for the determination of proportional valuation of such aircraft while solely engaged in interstate commerce. This result produces the obvious error of attributing to the aircraft a taxable situs in Nebraska.

9. The Court further erred in failing to recognize Section

452 of the Civil Aeronautics Act, wherein there were established areas and duties of the governmental administration in reference to the flight carried on by plaintiff-appellant. The Court failed to recognize that the Stipulation of Facts [fol. 60] specifically brought forth that the aircraft in question went into and out of Nebraska on regularly assigned aerial highways under and by virtue of the supervision and traffic direction of United States Government employees at the control tower owned, run, operated, and financed entirely by the Federal Government at Omaha, Nebraska. The Court thus failed to recognize that the traffic carried on by appellant's air carriers in the space above Nebraska is outside the jurisdiction of Nebraska as to situs, operation, and police power. The Civil Aeronautics Act, with all its amendments, clearly establishes these factors (see citation to entire Civil Aeronautics Code in Jurisdictional Statement).

10. The Court further erred in failing to recognize the decisional law that has been announced in reference to the air above Nebraska and all other states of the United States. The Supreme Court of the United States held in *U.S. v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, that:

"It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared."

The position of defendants-appellees taken below that the aircraft are taxed in fair and reasonable relation to the "use of such equipment within and through the state" was erroneously affirmed by the court below, when the taxed aircraft were neither "within nor through" the state at any time except to land and to take off and to load and unload interstate mail, freight, express, and passengers.

11. The Court has erred in seeking to establish by the Opinion the fairness and reasonableness of the valuation formulae set forth in the statute, when the question submitted to the Court was the repugnancy of the entire *ad valorem* statute in question to the Commerce Clause of the

Federal Constitution as a burden upon interstate commerce. The Stipulation of Facts of record proves that the aircraft of plaintiff-appellant were in the State of Nebraska while solely engaged in interstate commerce rather than kept or remaining within the State for any other use. In consequence thereof, the valuation formulae [fol. 61] declared fair and reasonable by the court below in its Opinion is an erroneous conclusion because based upon conditions of flight that cannot reach nor be applied to Braniff Airways operating in Nebraska.

12. The Court erred in recognizing as a valid exercise of the taxing powers of the State of Nebraska the application of the formulae set forth in Section 77-1245 of said Act (Appendix B attached to Jurisdictional Statements). It is apparent from the Act itself that the defendants-appellees, in order to apply said formulae, must do so in violation of Article I, Section 9, Clauses 5 and 6, and Section 10, Clauses 2 and 3, of the Constitution of the United States. Those sections of the Constitution prohibit states from levying a tax, directly or indirectly, upon goods, wares, and merchandise imported from one state to another and laying a duty based upon tonnage without the consent of Congress. By the Civil Aeronautics Act Congress has kept to itself all power of regulation over air carriers and their respective aircraft engaged in interstate commerce, and likewise over those aircraft that are used in intrastate commerce because of the necessity of even intrastate flights entering into the domain of exclusive federal jurisdiction when they fly into the air above a state. (*Rosenhan v. U. S.*, 131 F. 2d 932; cert. denied.)

13. The Court erred when it considered in point to sustain its holding of validity of the taxing statute in question the cases of *Pullman's Palace-Car Co. v. Commonwealth of Pa.* (1891), 141 U.S. 18, 11 S.Ct. 876, and *Ott v. Mississippi* (1949), 336 U.S. 169, 69 S.Ct. 432. It appeared in both cases that the instrumentality (in one case Pullman cars, and in the other, inland vessels) had attained a taxable situs within the state by the instrumentalities' being kept there long periods of time and in great numbers. It was stated in the *Pullman* case in reference to the non-taxability of ships and vessels engaged in interstate com-

merce, with a home port elsewhere, that such are not subject to taxation. "But this is because they are not, in any [fol. 62] proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and therefore can be taxed only at their legal situs,—their home port, and the domicile of their owners." In the *Ott* case the question submitted to the court and presented in the briefs clearly set forth that the vessels that were taxed because doing business on the inland waters within the State of Louisiana had attained a taxable situs therein, and that the statute "was intended to cover and actually covers here, an average portion of property permanently within the state—and by permanently is meant throughout the taxing year."

14. The Court erred in assuming that the plaintiff-appellant's aircraft were doing business within the State of Nebraska and thus subject to ad valorem taxation therein, merely because the aircraft were required necessarily to alight from the airplanes above the State solely to load and unload persons and property in interstate commerce and to depart immediately when that work was completed within from five to twenty minutes. Such holding was in direct opposition to the mandate of Article I, Section 8, Clause 3, of the Federal Constitution, which was presented to the court below and rejected as shown by the Opinion. The Supreme Court of Nebraska has recognized in similar instance that a city ordinance that required a tax or license of a firm taking orders for merchandise within the city without maintaining an established place of business therein, was repugnant to the Commerce Clause of the Federal Constitution. *Best & Co. v. City of Omaha* (1948), 149 Neb. 868, 33 N. W. 2d 150; cert. denied. The Supreme Court of Nebraska stated in that case:

"* * * The court held that the power granted to Congress to regulate commerce among the states, being exclusive when the subjects are national in their character, and admitting only of one uniform system of regulation, the failure of Congress to exercise that power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. In the opinion the court

said: 'In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. [fols. 63-64] "The court further held that interstate commerce cannot be taxed at all by a state even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the state.

* * * * *

"We conclude that the ordinances in question directly and unlawfully regulate and burden interstate commerce in violation of Article I, Section 8 of the Constitution of the United States."

15. The Court erred in failing to recognize and apply the concepts of law set forth in *Spector Motor Service, Inc. v. O'Connor* (1951), 340 U.S. 602, 71 S. Ct. 508, wherein the Supreme Court of the United States held:

"This proceeding attacks, under the Commerce Clause of the Constitution of the United States, art. 1, § 8, cl. 3, the validity of a state tax imposed upon the franchise of a foreign corporation for the privilege of doing business within the State when (1) the business consists solely of interstate commerce, and (2) the tax is computed at a nondiscriminatory rate on that part of the corporation's net income which is reasonably attributable to its business activities within the State. For the reasons hereinafter stated, we hold this application of the tax invalid."

Wherefore, plaintiff-appellant, Braniff Airways, Incorporated, prays that the final Opinion, Judgment and Decree of the Supreme Court of Nebraska be reversed, and for such other and further relief as the Court may deem proper, and for its taxable costs expended herein.

Dated October 14, 1953.

Signed by Counsel of Record.

[fols. 65-104] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

STATEMENT REQUIRED BY RULE 12(2) (omitted in printing)

[fols. 105-106] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

[Title omitted]

ORDER ALLOWING APPEAL—October 14, 1953

Plaintiff-appellant having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final Opinion, Judgment and Decree of this Court in this cause entered on July 17, 1953, and from each and every part thereof, and having presented its Assignment of Errors and Prayer for Reversal and the Statement as to the Jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and Rules of the Supreme Court of the United States in such cases made and provided,

It is therefore ordered that said appeal be and the same is hereby allowed as prayed.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of Five Hundred Dollars (\$500.00), with good and sufficient surety conditioned as may be required by law.

It is therefore ordered that citation shall issue accordingly.

Dated October 14, 1953.

Robert G. Simmons, Chief Justice, Supreme Court of the State of Nebraska.

[fols. 107-108] Citation in usual form showing service on Clarence S. Beck (omitted in printing).

[fols. 109-110] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

ORDER DIRECTING CLERK OF THE SUPREME COURT OF NEBRASKA TO TRANSMIT APPEAL PAPERS TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES (omitted in printing)

[fols. 111-113] Bond on Appeal for \$500.00 filed October 14, 1953 (omitted in printing).

[fol. 114] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

[Title omitted]

PRAECIPE—Filed October 16, 1953

To: George H. Turner, Clerk of the Supreme Court of Nebraska:

You will please prepare a transcript of the record in the above-entitled cause, which was an original action in the Supreme Court of Nebraska, General Number 33260, and which was entitled Mid-Continent Airlines, Inc., now Braniff Airways, Incorporated, as plaintiff, versus Nebraska State Board of Equalization and Assessment, et al., as defendants. The said plaintiff will be carried forth in the appeal papers as Braniff Airways, Incorporated, as plaintiff-appellant, and the defendants as now existing in their respective offices as defendants-appellees.

1. The Petition filed in the Supreme Court of Nebraska on July 15, 1952, by plaintiff-appellant.
2. Answer of defendants-appellees, filed August 18, 1952.
3. Stipulation of Facts, filed February 26, 1953.
4. Stipulation in reference to substituted party defendants in the respective offices, filed April 25, 1953.

5. Opinion, Findings, Conclusions, Judgment and Decree of the Supreme Court of Nebraska, designated as the final Opinion of said Court, filed and entered July 17, 1953.

6. Order Allowing Appeal, signed and entered October 14, 1953.

7. Assignment of Errors and Prayer for Reversal, filed Oct. 14, 1953.

8. Petition for Appeal, filed October 14, 1953.

9. Citation, signed and entered October 14, 1953.

[fols. 115-116] 10. Jurisdictional Statements, filed October 14, 1953.

11. Statement required by Rule 12(2), including Rule 12(3), filed October 14, 1953.

12. This Praecipe, filed October 16, 1953.

13. Appeal Bond, approved and filed October 14, 1953.

14. Stipulation of parties in reference to proceeding in the appeal as "Braniff Airways, Incorporated, Plaintiff-Appellant."

15. Stipulation withholding execution and distress warrants during pendency of appeal.

16. Order that appeal papers be forwarded to Supreme Court of the United States, signed and entered October 14, 1953.

17. Judgment of the Supreme Court of Nebraska, entered with the Opinion on July 17, 1953.

Dated October 15, 1953.

Signed by Counsel of Record.

[fols. 117-118] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

[Title omitted]

STIPULATION RE SUBSTITUTION OF THE NAME, BRANIFF AIRWAYS, INCORPORATED, AS PLAINTIFF-APPELLANT—October 16, 1953

It is stipulated by and between the parties hereto that the caption on the appeal to the Supreme Court of the

United States in this cause shall be "Braniff Airways, Incorporated, Plaintiff-Appellant," in lieu of "Mid-Continent Airlines, Inc., now Braniff Airways, Incorporated," which was the caption designation in the Supreme Court of Nebraska.

This stipulation is in accordance with the Stipulation of Facts on file with the appeal papers and attached to the Jurisdictional Statements as Exhibit C, which stipulations, as shown therein, were due to the legal consolidation and merger of Mid-Continent Airlines with Braniff Airways, Incorporated, and Braniff Airways, Incorporated, assuming and continuing the affairs of Mid-Continent Airlines, Inc., with its own affairs as Braniff Airways, Incorporated.

Dated October 15, 1953.

Nebraska State Board of Equalization and Assessment, et al., Defendants-Appellees, By Clarence S. Beck, Attorney General, By C. C. Sheldon, Assistant Attorney General; Braniff Airways, Incorporated, Plaintiff-Appellant, By William J. Hotz, Of Hotz & Hotz, Its Attorneys, 1530 City National Bank Building, Omaha, Nebraska.

[fols. 119-120] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

STIPULATION RE WITHHOLDING EXECUTION—October 15, 1953

It is stipulated and agreed by and between the parties hereto that the provisions of paragraph 10 of the Answer of the defendants-appellees filed in the above-entitled cause on August 18, 1952, to wit,

"That no distress warrant has heretofore been issued and that none would be issued during the pendency of the litigation concerning the validity of the challenged statute,"

shall now be made the subject matter of this stipulation during the pendency of this appeal to the Supreme Court of the United States, and that execution shall be stayed until the final decision in this cause in reference to the challenged statute shall have been rendered; that likewise no distress warrants may be issued for taxes assessed under the said challenged statute during the pendency of the appeal and the final determination of the validity of said challenged statute.

Dated October 15, 1953.

Signed by Counsel for Respective Parties.

[fol. 121] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. —

ACKNOWLEDGMENT OF RECEIPT OF SERVICE OF APPEAL PAPERS
(Omitted in printing)

[fol. 122] IN SUPREME COURT OF NEBRASKA

CLERK'S CERTIFICATE

STATE OF NEBRASKA,
Lancaster County, ss:

I, George H. Turner, Clerk of the Supreme Court of Nebraska and custodian of the records and files thereof, do hereby certify that the foregoing pages, numbered 1 to 121, inclusive, are a true, full and complete transcript of all such parts of the record and proceedings in the case of Mid-Continent Airlines, Inc., v. Nebraska State Board of Equalization & Assessment, No. 33260, and also of the Opinion of this Court rendered therein, as are mentioned and described in the praecipe for this record as the same now appear of record and on file in my office.

In witness whereof, I have hereunto set my hand and officially affixed the seal of said court at my office, in the City of Lincoln, Nebraska, this 19th day of November, 1953.

Geo. H. Turner, Clerk of Supreme Court of Nebraska. (Seal.)

[fol. 123] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. 476

POINTS RELIED UPON FOR REVERSAL

Plaintiff-appellant's statement of Points Relied Upon for Reversal is intended to include all the points set forth in the Assignments of Error and Prayer for Reversal. The Assignments of Error are condensed as the Points Relied Upon for Reversal, as follows:

1. A Nebraska ad valorem taxing statute, Sections 77-1244 to 77-1250, Reissue Revised Statutes of Nebraska for 1943, was passed in 1949, effective for 1950. By virtue of said Statute the defendants-appellees, who are the final taxing authorities for Nebraska, assessed thereunder general revenue-producing State taxes for 1950, and subsequent years, against plaintiff-appellant, who is Braniff Airways, Incorporated. The assessment so made was based upon the value of the plaintiff-appellant's aircraft under a formula defined in the Act.

2. The Supreme Court of Nebraska on July 17, 1953, entered a Final Opinion and Judgment for the taxes so levied and assessed, deciding with finality that the aforesaid State Statute was valid and the assessments thereunder enforceable against appellant airline. The defenses asserted by appellant that the Nebraska Statute was repugnant to the Commerce Clause of the Federal Constitution (Article I, Section 8, Clause 3) and the Tonnage Clause (Article I, Section 10, Clause 3) were rejected. The court below committed reversible error in so deciding.

3. Appellant substantiates its Prayer for Reversal on the aforesaid federal constitutional grounds because, from

the Stipulation of Facts of record and the facts set forth in the Opinion of the Supreme Court of Nebraska, it appears that:

(a) Nebraska is neither the state of creation nor the home port of the plaintiff-appellant, Braniff Airways, Incorporated, nor its predecessor, Mid-Continent Airlines, Inc.

(b) None of the aircraft of appellant were in the State of Nebraska any time for repairs, storage, inspection, governmental tests, or rebuilding.

(c) All aircraft in question of appellant were flown onto a municipally owned airport in Nebraska, in accordance with the terms of a previously executed contractual right with the municipality. The descent was from federally exempted and controlled airlines above the State and was done solely in pursuit of appellant's commerce among the several states. After unloading and loading persons and property from without the State or destined from Nebraska to other states, the aircraft were flown from the airport into the airlines above solely in furtherance of appellant's interstate commerce missions among the several states.

(d) For the aforescribed stops in Nebraska appellant was and is charged by the airport authorities, and accordingly pays for each of said landings and take-offs based upon the certified tonnage of each aircraft, defined in the aforementioned written contract between appellant and the municipality. State gasoline taxes were and are also paid by appellant upon fuel bought at the airport and used to propel its aircraft in interstate flight. Depot privileges for the use of appellant in carrying on its interstate business and for the use of passengers and for the handling of [fol. 125] mail, freight, and other personal property are paid for by appellant upon a square-foot rental basis set forth in the same contract with the municipality, which provides for landing and take-off charges.

(e) The period of time each of appellant's aircraft is on the ground at the airport in Nebraska is from five to twenty minutes. The stops are made at scheduled

times by appellant and are made solely in pursuit of its commerce among the several states.

(f) The appellant's aircraft traverse no lands in Nebraska at any time except incidental to alighting from and ascending into the sky from the runways of the airport, as aforesaid.

(g) The incident of the tax, according to the taxing Statute in question, is the aircraft fully equipped for flight.

(h) The National Congress has, by legislation in force at all times herein involved, assumed the duties of licensing, supervising, regulating, and controlling aviation, including all the landings and take-offs. In execution of this national legislation the United States owns, operates, finances, and maintains a control tower in Nebraska at the municipal airport for such purposes. In consequence thereof, Congress has pre-empted the field of aviation, including the flights in and out of the airports of Nebraska, leaving no reciprocal benefits to be granted by Nebraska for the State taxes assessed. No inspection laws, no quarantine or other health regulations, public welfare or police regulations of the State are here involved, for the tax income is for the general state fund.

4. Furthermore, the formula set forth in the Nebraska Act to arrive at the valuation of the aircraft upon which the ad valorem tax was and is levied, is constitutionally invalid because, in effect, it requires a vessel bound to or from one state to another to pay a State tax based upon the tonnage and capacity of the vessel, which is in violation of the Tonnage Clause (Article I, Section 10, Clause 3) of the Constitution of the United States.

[fol. 126] 5. The Final Opinion, Judgment, and Decree of the Supreme Court of Nebraska entered below should be reversed because the decision upholds as valid the State taxing Statute which places a burden upon interstate commerce and is repugnant to the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States.

6. Likewise, the burden cast upon commerce is made clear by the express provision of the State Act that the

tax in question is levied to produce general revenue for the State, and the valuation for the levy and assessment of the tax is based upon the tonnage of the vessels, which are the various aircraft, as the instrumentalities of commerce. Thus, the Act is in violation of and repugnant to the Tonnage Clause, Article I, Section 10, Clause 3, of the Constitution of the United States.

Dated November 24, 1953.

Braniff Airways, Incorporated, Plaintiff-appellant,
By William J. Hotz, Of Hotz & Hotz, Its Attor-
neys, 1530-5 City National Bank Building, Omaha,
Nebraska.

Service acknowledged and receipt of one copy hereof this
25th day of November, 1953.

C. C. Sheldon, Asst. Atty. Gen., Attorney for De-
fendants-Appellees.

[fol. 127] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. 476

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that the printed record shall consist of the following:

1. The caption of the case shall be that set forth in the Petition for Appeal, page 54, and shall be set forth once on the first pleading printed. Thereafter the word "caption" shall appear.

2. The signatures appearing on the Petition for Appeal, page 54, of the respective counsel shall be as there stated, with the addition of the name of Roger J. Whiteford of the firm of Whiteford, Hart, Carmody & Wilson, 815 Fifteenth Street, N. W., Washington, D. C., as attorney on the brief for Braniff Airways, Incorporated.

3(a) Wherever the signatures of counsel appear on the appeal papers, there shall appear once the names of Wil-

liam J. Hotz, William J. Hotz, Jr., and Robert M. Kane, 1530-5 City National Bank Building, Omaha, Nebraska, as attorneys for plaintiff-appellant, and thereafter the names need not be further printed. The printed record shall state, "Signed by counsel of record."

(b) The signatures of counsel for defendants-appellees shall be once stated as "Clarence S. Beck, Attorney General of Nebraska, and C. C. Sheldon, Assistant Attorney General, as the attorneys of record for defendants-appellees. Thereafter the names need not be further printed, but the printed record shall state, "Signed by counsel of record."

4. The following appeal papers shall be copied in full, with the exceptions above noted:

(a) Petition for Appeal, page 54.

(b) Order Allowing Appeal, with date and signature of the Chief Justice of the Supreme Court of Nebraska, page 105.

[fol. 128] (c) Assignments of Error and Prayer for Reversal, page 56, with the exception of caption and signatures, including the prayer and date.

(d) Jurisdictional Statement, page 68, eliminating caption but including filing date. The appendixes shall be printed only once in the printed record, and if printed with the Jurisdictional Statement, shall be referred to in other appeal papers as accompanying the Jurisdictional Statement, giving page number in printed record.

(i) Appendix A attached to the Jurisdictional Statement shall consist of the Judgment, page 33, and the Opinion, page 35, it being the intention that both the Judgment and the Opinion shall be set up as an appendix to the Jurisdictional Statement and thereafter need not be reprinted but referred to by printed page number.

(ii) Appendix B is the state statute drawn in question and referred to as Sections 77-1244 to 77-1250, Reissue Revised Statutes of Nebraska for 1943. These are attached to the Jurisdictional Statement, page 68, and when once printed, may be referred to by page number of the printed record.

(iii) Appendix C shall be printed only once with the Jurisdictional Statement. This is the Stipulation of Facts attached to the Jurisdictional Statement, page 68. When this Stipulation of Facts is once printed in the record, it may suffice, and whenever else referred to in the printed record, it shall set forth the printed page where the same may be found. The date shall be stated on the Jurisdictional Statement. In the Stipulation of Facts the sections of the Nebraska statute, 77-1244 to 77-1250, may be omitted and reference made to the same statute printed as Appendix B.

(e) Citation of Appeal, page 107, eliminating the caption but stating, "To (all defendants-appellees set forth in the above caption)." Then set forth only the body of the Citation, the date and the signature of the court, and include the acknowledgment of the service of the Citation and the signature thereon.

(f) Print only the following in connection with the Order Directing Clerk to Transmit Appeal Papers, page 109: "October 14, 1953, Order signed by Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska, directed Clerk of that court to transmit appeal papers to the Clerk of the Supreme Court of the United States."

(g) Bond for Costs on Appeal, page 111, need be copied only by stating, "Surety company bond in the amount of \$500 signed October 14, 1953, approved by Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska."

(h) Statement Required by Rule 12(2), page 65, need not be printed in full, but state "Statement Required by Rule 12(2) was signed by attorneys for the plaintiff-appellant and served upon counsel for defendants-appellees October 14, 1953, and service of the same acknowledged on October 14, 1953. Included in the Statement so served was a copy of Rule 12, paragraph 3, which was set forth in full."

[fol. 129] (i) Acknowledgment of Receipt of Service of Appeal Papers (page 121) should state only, "Service of appeal papers on October 16, 1953, was acknowledged by attorneys for defendants-appellees as follows: (Here set forth the 12 items listed, with no further printing.)"

(j) Stipulation re Withholding Execution, instead of printing in full state, "On October 15, 1953, the respective

parties agreed that execution would be withheld in reference to the taxes in question during the pendency of the appeal." (page 119).

(k) Stipulation re Substitution of the Name, Braniff Airways, Incorporated, as plaintiff-appellant, page 117, shall be copied verbatim, with the statement that it was signed by counsel for the respective parties.

(l) Petition in the original action for declaratory judgment, page 3, shall be set forth in full, except caption and signatures, giving date and stating, "signed and verified by counsel for plaintiff-appellant."

(m) Answer, page 9, shall be set forth in full, except caption and signatures, giving date and stating, "signed and verified by counsel for defendants-appellees."

(n) Stipulation re Change in Incumbency of State Officers to comply with the names stated in the caption, signed by the respective parties need be set forth only by the following statement: "The parties stipulated on April 24 and 25, 1953, that the parties appearing at the time of filing the Petition for Appeal on October 14, 1953, were as set forth in the caption on the Petition for Appeal." (page 31).

(o) Praecipe (page 114) shall be set forth in full with the exception of caption and signatures.

(p) Certificate (page 122) shall be set forth in full.

Dated November 23, 1953.

Braniff Airways, Incorporated, Plaintiff-Appellant,
By Wm. J. Hotz, Of Hotz & Hotz, 1530 City National Bank Building, Omaha, Nebraska, Its Attorneys; Nebraska State Board of Equalization and Assessment, et al., Defendants-Appellees, By Clarence S. Beck, Attorney General, By C. C. Sheldon, Assistant Attorney General.

[fol. 130] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1953

No. 476

ORDER NOTING PROBABLE JURISDICTION—January 4, 1954
Appeal from the Supreme Court of the State of Nebraska

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable juris-
diction is noted.

January 4, 1954.

(2892)



FRANK AIRWAY INCORPORATED

ALASKA STATE BOARD OF EQUALIZATION
ASSESSMENT, ET AL.

THE STATE OF ALASKA

STATEMENT AS TO JURISDICTION

WILLIAM J. [illegible]
WILLIAM J. [illegible]
WILLIAM J. [illegible]

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 476

BRANIFF AIRWAYS, INCORPORATED,

vs.

Appellant,

NEBRASKA STATE BOARD OF EQUALIZATION AND
ASSESSMENT, ET AL.

JURISDICTIONAL STATEMENT

This statement is made in pursuance of Rule 12, Paragraphs 1, 2, and 3, as amended April 6, 1942. This statement and a copy of Rule 12(3) were served upon the defendants-appellees on October 14, 1953, with all other appeal papers required by the Rules, the Order Allowing Appeal having been signed and entered by the Chief Justice of the Supreme Court of Nebraska on October 14, 1953, which was within the ninety-day period provided by law for obtaining such order.

Opinion Below

The appeal is from the final Opinion, Judgment and Decree of the highest court of the State of Nebraska, which is the Supreme Court of Nebraska, this cause being designated

below as Number 33260 entitled Mid-Continent Airlines, Inc., versus Nebraska State Board of Equalization and Assessment, et al. The case goes forward on appeal as Braniff Airways, Incorporated, plaintiff-appellant, in accordance with stipulation of parties, Mid-Continent Airlines having merged with Braniff Airways in August, 1952, during the pendency of the litigation.

The Opinion, Judgment and Decree (designated as the all-inclusive term, "opinion") was filed and entered and became final on July 17, 1953, no other proceedings permissible in said cause on and after twenty days from said date. The mandate has been stayed pending the outcome of this appeal to the Supreme Court of the United States in accordance with order of the Chief Justice of the Supreme Court of Nebraska. The official opinion is reported in 157 Neb. 425, 59 N. W. 2d 746.

The action below was instituted as an original action for declaratory judgment in the Supreme Court of Nebraska. The sole question involved was the federal question of whether or not certain tax laws of the State of Nebraska, which became effective in 1950, were repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States. The decision was in favor of the validity of the statutes and against the claim of repugnancy. The said Opinion, showing upon its face the federal question involved and its disposition, is referred to and made a part of this Jurisdictional Statement and marked "Appendix A." In the Assignment of Errors application is made on this appeal to reverse this Opinion upon the grounds of its repugnancy to the said Article I, Section 8, Clause 3 of the Constitution of the United States.

Jurisdiction

Title 28, United States Code, Section 1257(2), states that a cause such as this may be reviewed by the Supreme Court of the United States "by appeal where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

There was drawn in question specifically and directly the aforesaid Commerce Clause of the Federal Constitution (Art. I, Sec. 8, Cl. 3), and indirectly for comparative purposes Article I, Section 9, Clauses 5 and 6, and Section 10, Clauses 2 and 3, and specifically and directly the invalidity, for that reason, of Sections 77-1244 to 77-1250, R. R. S. 1943. Copy of these statutes which were drawn directly in question is attached hereto as Appendix B.

Question Presented

The question presented is whether or not the final Opinion, Judgment and Decree (Appendix A) of the Supreme Court of Nebraska should be reversed because the above-designated state ad valorem taxing statute (Appendix B) is in conflict with and repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States. The plaintiff-appellant presents the question that the State of Nebraska, under and by virtue of said state statutes, seeks to levy an ad valorem tax upon the aircraft of the plaintiff-appellant, even though admittedly said airplanes come into and leave Nebraska solely in pursuit of interstate commerce. The State of Nebraska is neither the home port nor the state of creation of plaintiff or its predecessor, Mid-Continent Airlines, Inc.

Thus, it is apparent from the Opinion (Appendix A) and the statutes (Appendix B) that the position of the plaintiff-appellant is in conflict in no way with the decision of this

Court in *Northwest Airlines, Inc. v. State of Minnesota* (1944), 322 U. S. 292, 64 S. Ct. 950. Nor is it in conflict with *Ott v. Mississippi* (1949), 336 U. S. 169, 69 S. Ct. 432, nor *Standard Oil Co. v. Peck* (1952), 342 U. S. 382, 72 S. Ct. 309, nor any other decision of the Supreme Court of the United States, as more particularly will be seen from the following Statement.

Statutes and Constitutional Provisions Involved

United States:

Constitution, Article I, Section 8, Clause 3.

Article I, Section 9, Clauses 5 and 6.

Article I, Section 10, Clauses 2 and 3.

Title 28, U. S. C., Sec. 1257(2).

Title 49, U. S. C., Ch. 9—Civil Aeronautics Code:

Subchapter I, Definitions, Sec. 401; Declaration of Policy, Sec. 402; Public Right in Transit, Sec. 403.

Subchapter II, Organization of Board, Sec. 421-427.

Subchapter III, Powers and Duties of Administrator, Sec. 451-60.

Subchapter IV, Air Carrier Economic Regulation, Sec. 481-96.

Subchapter V, Nationality and Ownership of Aircraft, Sec. 521-24.

Subchapter VI, Civil Aeronautics Safety Regulation, Sec. 551-60.

Subchapter VII, Air Safety, Sec. 581-2.

Subchapter VIII, Other Administrative Agencies, Sec. 601-3.

Subchapter IX, Penalties, Sec. 621-23.

Subchapter X, Procedure, Sec. 641-9.

Subchapter XI, Miscellaneous, Sec. 671-85.

Subchapter XII, Security Provisions, Sec. 701-5.

Subchapter XIII, War Risk Insurance, Sec. 711-22.

Title 49, U. S. C., Ch. 14—Federal Aid for Public Airport Development; Ch. 16—Development of Commercial Airport.

House Report No. 2709; Text of Act, Vol. 1, 1950, p. 1063, for "Federal Airport Act."

Also same reference, Vol. 2, p. 3998, for House Report 3038; Text of Act, Vol. 1, p. 1084, "To Promote the Development of Improved Transport Aircraft."

Nebraska:

Ch. 77, R. R. S. 1943, Sec. 1244 to 1250; statute involved copied in full, Appendix B.

Statement

Attached to this Jurisdictional Statement as Appendix C is a Stipulation of Facts entered into by the parties hereto and duly filed in the Supreme Court of Nebraska as the factual basis for the decision. From a reading of the Stipulation of Facts of the parties and the facts set forth in the Opinion of the Court, it is apparent that:

(a) The appellant's aircraft were in the State of Nebraska solely and exclusively while engaged in loading and unloading freight, passengers, and mail coming into Nebraska through the air from outside the state, landing within the state for the sole and only purpose of unloading or loading passengers, freight, and mail, then ascending immediately into the airways above Nebraska and departing in those airways from the State of Nebraska in pursuit of its interstate flights.

(b) The Court found that "it is not disputed that plaintiff's operations are interstate in character."

(c) Nowhere in the stipulated facts or in the findings of the Court is there justification for the conclusion that the aircraft in question attained a taxable situs in the State of Nebraska or that said aircraft were within the State of Nebraska for any time or purpose except while engaged in interstate commerce.

(d) The Court found that "plaintiff's activities in Nebraska consist of making landings at Omaha and Lincoln on regularly scheduled stops on interstate flights. There are fourteen of such flights in and out of

Omaha each day and four such flights in and out of Lincoln. These stops are made to handle mail, express, freight, and passengers and are usually of short durations, generally from five to twenty minutes."

(e) The Court found, in accordance with the Stipulation of Facts (Appendix C), that Mid-Continent Airlines was organized under the laws of the State of Delaware with its home port at St. Paul, Minnesota. In August, 1952, Mid-Continent merged with the plaintiff-appellant, Braniff Airways, Incorporated. Braniff Airways, Incorporated, was organized and exists under and by virtue of the laws of Oklahoma. The main offices of Mid-Continent Airlines had been in Kansas City, Missouri, but were moved after the consolidation to Dallas, Texas. For purposes of repair, storage, and similar purposes all the aircraft go to the airport at Minneapolis-St. Paul, Minnesota. The State of Nebraska is neither the home port nor the state of creation of the plaintiff-appellant or its predecessor, Mid-Continent Airlines. From the Stipulation of Facts (Appendix C) it is seen that all the aircraft in question must return for purposes other than interstate flight to a port of registration, Minneapolis-St. Paul, for inspection, storage, repairs, and governmental certification.

(f) From the Stipulation of Facts it appears that only the aircraft engaged in interstate commerce are the subject matter of taxation under the Nebraska taxing statutes involved herein, and that said aircraft come into Nebraska and depart therefrom over regularly assigned aerial highways that are under the sole jurisdiction of the Federal Government, acting through the Civil Aeronautics Board; that all control, direction, and movement of the aircraft are under governmental jurisdiction at all times, even while landing and taking off in the State of Nebraska.

(g) The Stipulation of Facts further discloses that four of fourteen aircraft move in intrastate commerce in Nebraska between Omaha and Lincoln. This consists of a stopover at Lincoln by some of the aircraft

while en route to and from Omaha, Nebraska, but this transportation is carried on while the air craft themselves are engaged in interstate commerce in and out of the State of Nebraska. Any local business taxed is not the subject matter of this lawsuit (Sec. 77-1244(1) and 1246, Appendix B).

All these facts are set forth with exactness in the Stipulation of Facts (Appendix C), to which reference is made as if copied verbatim at this point in the Statement.

The Questions Involved Are Substantial

1. The ad valorem tax levied upon the plaintiff-appellant's air craft is based upon a valuation of those aircraft in accordance with the apportionment formula set forth in the Act. (Appendix B). Any ad valorem tax upon the sole and only instrumentality of an operator in interstate commerce raises a substantial question of the burden which said tax places upon the instrumentality, and, if the tax statute is found to be repugnant to the Commerce Clause of the Constitution of the United States, the element of the fairness or unfairness of the method of valuation for such tax is secondary in importance.

2. If the Nebraska statute is upheld as a valid exercise of the taxing power of the State against air carriers engaged solely in interstate commerce within the State, it obviously will have its effect as a precedent throughout the United States and the aircraft industry as a whole.

3. The Stipulation of Facts shows that the plaintiff-appellant at Omaha, Nebraska, pays upwards of \$22,000 a year for the privilege of landing at the Omaha Municipal Airport and, in addition, pays for certain depot rental facilities, janitor service, light, heat, and power that is used. It also pays a gasoline tax aggregating more than \$14,000 a year for gasoline bought for and used in propelling its aircraft in and out of the State of Nebraska. In addition, it pays an

ad valorem tax upon all its property that has attained a taxable situs within Nebraska, such as office furniture, office equipment, and other property that remains within the State of Nebraska.

4. It is apparent that the question is substantial, when Congress has stated in the Civil Aeronautics Act, Sec. 403, Title 49 U. S. C.:

“There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States.”

This is followed by a complete congressional preemption of the field of aviation in all its activities, as more particularly set forth in the sections of the Civil Aeronautics Code above cited. Consequently, an ad valorem tax upon air carriers is an attempted regulation by the State, in defiance of the Commerce Clause (under which the Civil Aeronautics Code may be effectively administered without interference), by casting a burden of ad valorem taxation upon the air carriers.

5. Substantial questions are involved when it appears that the State of Nebraska claims it may tax the air carrier a reasonable amount upon the equipment used in pursuit of interstate commerce “within and through” the State. A substantial question in reference to all aviation is that when an aircraft, fully equipped for flight, comes into and goes out of the State solely for the purpose of landing and discharging its passengers and cargo at a particular airport and then immediately departs, and pays for such privilege, such activity has been considered by the State of Nebraska as attaining a taxable situs within the State, and the State considers that the allocation formula set forth in the statute may be applied as a test for the valuation of the aircraft.

6. Questions of substance are involved when it is apparent from the opinion (Appendix A) and from the Stipulation of Facts (Appendix C) that the pronouncements of the Supreme Court of the United States, through the Justices thereof, are in conflict with the objective of the Nebraska taxing statute (Appendix B). The opinion in *Northwest Air Lines v. Minnesota* (1944), 322 U. S. 303, 64 S. Ct. 950, states:

“Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

* * * *

“Does the act of landing within a state, even regularly and on schedule, confer jurisdiction to tax? Undoubtedly a plane, like any other article of personal property, could land or remain within a state in such a way as to become a part of the property within the state. But when a plane lands to receive and discharge passengers, to undergo servicing or repairs, or to await a convenient departing schedule, it does not in my opinion lose its character as a plane in transit. Long ago this Court held that the landing of a ship within the ports of a state for similar purposes did not confer jurisdiction to tax. *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, 15 L. Ed. 254; *City of St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192; *Morgan*

v. Parham, 16 Wall. 471, 21 L. Ed. 302; cf. Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 26 S. Ct. 679, 50 L. Ed. 1082, 6 Ann. Cas. 205. I cannot consider that to alight out of the skies onto a landing field and take off again into the air confers any greater taxing jurisdiction on a state than for a ship for the same purposes to come alongside a wharf on the water and get under way again.

“What, then, remains as a basis for Minnesota’s claim to tax this entire fleet of planes at their full value as property of the State of Minnesota? They have been within the state only transiently and in the same manner in which they have been in many states: to serve the public and to be serviced. The planes have received no ‘protection’ or ‘benefit’ from Minnesota that they have not received from many others. It might be difficult, in view of the complete control of this type of activity by the Federal Government, to find what benefits or protection any state extends. But no distinction whatever can be pointed out between those extended by Minnesota and those extended by any state where there is a terminal or a stopping place.”

See, also, *Rosenhan v. U. S.* (1942), 131 F. 2d 932 (cert. denied).

7. Substantial questions are involved when it appears from the Opinion and the Stipulation of Facts that Congress alone shall have the right to levy a tax upon the aircraft in question and that it has not delegated that authority to the State of Nebraska. The views of plaintiff-appellant are that Congress could not divest itself of that exclusive right.

8. The State of Nebraska has undertaken by the taxing statute in question to circumvent that constitutional provision by asserting that it has the right, in the manner set forth in the statute (Appendix B), to tax an aircraft based upon the State’s own method of evaluating the aircraft when it comes into and departs from the State of Nebraska

in pursuit of commerce among the several states. The people of the United States, constantly using the air carriers in interstate commerce, and the industry will be affected adversely to their respective interests in the event the Nebraska taxing statute is permitted to stand as a valid exercise of the taxing power of a state in reference to such air carriers.

9. It is respectfully submitted that this High Court has jurisdiction to hear this cause on appeal and, under the facts and law appearing from the Stipulation of Facts (Appendix C) and the Opinion (Appendix A), should note jurisdiction, and, upon hearing, reverse the Nebraska *ad valorem* taxing statute upon the grounds that it is repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States.

WILLIAM J. HOTZ,
WILLIAM J. HOTZ, JR.,
ROBERT M. KANE,
Counsel for Appellant.

APPENDIX "A"

OPINION OF THE SUPREME COURT OF NEBRASKA

MID-CONTINENT AIRLINES, INC., now Braniff Airways,
Incorporated,

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT,
ET AL.

No. 33,260

Filed July 17, 1953

1. Taxation: Constitutional Law. Statutes providing for the levy of an *ad valorem* personal property tax on flight equipment used in interstate commerce, when such flight equipment is wholly and continuously outside of the state of the owner's domicile during the tax year, is not violative of the Commerce Clause of the Constitution of the United States when such tax bears a fair and reasonable relation to the use of the property in the taxing state.

2. Sections 77-1244 to 77-1250, R. R. S. 1943, on the grounds here challenged, held not violative of Article I, section 9, clause 6, Article I, section 10, clause 3, or Article I, section 8, clause 3, of the Constitution of the United States.

Original action. Action dismissed.

William J. Hotz, William J. Hotz, Jr., William F. Dalton, and Robert M. Kane, for plaintiff.

Clarence S. Beck, Attorney General, and C. C. Sheldon, for defendants.

Heard before Simmons, C. J., Carter, Messmore, Yeager, Chappell, Wenke, and Boslaugh, JJ.

CARTER, J.:

This is an original action for a declaratory judgment commenced in this court to test the validity of sections 77-1244 to 77-1250, R. R. S. 1943. Such sections of the statutes authorize the assessment, levy, and collection of an *ad valorem* personal property tax against plaintiff's flight

equipment used in interstate commerce. Plaintiff contends that such taxation violates Article I, section 8, clause 3, of the Constitution of the United States, commonly referred to as the Commerce Clause. The defendants deny the unconstitutionality of the Nebraska act and assert the right to impose an ad valorem personal property tax upon plaintiff's flight equipment which is used within the state as a part of a system of interstate air commerce over fixed routes on regular schedules, so long as the allocation of the proportionate part of the property value and the levy thereon bear a fair and reasonable relation to the use of such flight equipment within the state. Briefly this constitutes the issue before the court.

Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in that state. The main executive offices of the plaintiff were in Kansas City, Missouri, until the consolidation of plaintiff with the Braniff Airways, Incorporated was effected on or about August 1, 1952, at which time such offices were moved to Dallas, Texas. It is stipulated that Braniff Airways, Incorporated, is substituted for Mid-Continent Airlines, Incorporated, as the party plaintiff. The home port to which all its fleet of planes must return is Minneapolis and St. Paul, Minnesota. Plaintiff is licensed by the Civil Aeronautics Board of the United States to engage in interstate transportation by air for hire under the provisions of Title 49, U. S. C. A., sections 401 to 705. Pursuant to such authority it operates a large number of aircraft upon regular schedules in trunk line flight from Minot, North Dakota, to New Orleans, Louisiana, making regular landings in North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Illinois, Kansas, Missouri, Oklahoma, Arkansas, Texas, and Louisiana. No planes land in plaintiff's domiciliary state of Delaware. Plaintiff operates over 7,336 of unduplicated route miles. Plaintiff's activities in Nebraska consist of making landings at Omaha and Lincoln on regularly scheduled stops on interstate flights. There are 14 of such flights in and out of Omaha each day and 4 such flights in and out of Lincoln. These stops are made to handle mail, express, freight, and

passengers and are usually of short duration, generally from 5 to 20 minutes. The home port for all planes here involved is the Wold-Chamberlain Air Field at St. Paul, Minnesota, where hangars, repair shops, and equipment are maintained. Municipal and federal government facilities are used at Omaha and Lincoln. The flight distance from Omaha to Lincoln is 60 miles and from Lincoln to Rulo it is 90 miles, these being the only routes traveled by any of plaintiff's planes in Nebraska within the limits of aerial routes specifically assigned by the Civil Aeronautics Administration. It is not disputed that plaintiff's operations are interstate in character and are subject to regulation by the federal government as an interstate common carrier. The gross income of plaintiff for 1951 was \$9,818,363, and the net profit was \$135,941. The income from the carriage of passengers, mail, freight, express, excess baggage, chartered planes, and miscellaneous sources is set forth in the record by stipulation. Plaintiff pays for depot rental space at Omaha in the amount of \$22,000 a year, and a tax of 2½ cents a gallon on gasoline used which amounted to \$14,180 in 1951. The tax levied in 1950 was \$4,280.44, and in 1951 it was \$4,518.29.

The formula for the assessment of the tax on flight equipment, defined in the statute as aircraft fully equipped for flight and used within the continental limits of the United States, is set forth in section 77-1245, R. R. S. 1943, as follows: "Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air

carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period." It is the contention of the plaintiff that the taxing of its flight equipment is prohibited by the Commerce Clause in any amount whatsoever. The question to be determined, therefore, is whether or not the levy of any ad valorem personal property tax on the flight equipment of the defendant on an allocation basis contravenes the Commerce Clause of the Constitution of the United States.

In *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 64 S. Ct. 950, 88 L. Ed. 1283, 153 A. L. R. 245, the court dealt with the taxation of airplanes by the State of Minnesota which were engaged in interstate commerce. The plaintiff was a Minnesota corporation, its principal place of business was in St. Paul, Minnesota, and the latter city was the home port of all its planes. All of its planes were continuously engaged in flying from state to state as interstate carriers except when laid up for repairs. The taxing authorities of Minnesota assessed a tax on the full value of the entire fleet of planes belonging to the plaintiff which came into the state. In upholding the tax on the full value of all of the planes of Northwest Airlines in Minnesota, the court said: "Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the 'home port' of all its planes. The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. See *State Tax Comm'n v. Aldrich*,

316 U. S. 174, 180. No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature and the practical consequences of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other State." In so holding the court specifically stated that the taxability of any part of this fleet by any other state than Minnesota, in view of the taxability of the entire fleet by that state, was not before, or decided by the court. It was on this latter point that differences arose over the proper disposition of the case. Interstate commerce may be required, of course, to pay its fair share of the property tax burden which the states, in which the interstate business is done, may lawfully impose generally on property located in them. In other words, interstate commerce bears no undue part of the burden if the personal property tax imposed by a given state is exclusive of all other property taxes assessed by other states, or, what is more material to the case before us, if the tax on its personal property regularly used over fixed routes in interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state. The failure of the court in the Northwest Airlines case to decide whether or not the factors set forth, which permitted full taxation in Minnesota, had the corresponding effect of preventing any taxation in any other state where interstate business was transacted by Northwest Airlines by means of the fleet of planes there involved, was the cause of the major division of the court on the issues involved. The majority to be consistent would necessarily be required to deny the right of taxation to other states in which Northwest Airlines planes engage in interstate business, or depart from the court's numerous holdings that multiple taxation of property used in interstate commerce constitutes an unlawful burden thereon in compelling the carrier to pay the taxing state more than

its fair share of taxes measured by the full value of the property. It is axiomatic, we think, that if one state may properly tax the full value of the property other taxes levied by other states would be a multiple taxation of the property constituting an unconstitutional burden upon interstate commerce.

The essential facts in the present case do not bring it within any announced rule that would permit any one state to levy an ad valorem personal property tax for the full value of the planes involved. In the present case the corporation domicile is in Delaware, its general offices in Texas, and the home port of the planes in Minnesota. Under such a division of the factors announced and considered in the Northwest Airlines case we cannot say that the fleet of planes in the case at bar has any taxable situs in any one state where the full value of such planes could be taxed. Under such a situation we think the Northwest Airlines case leaves the door open for a decision on the issue as to whether or not, in a case such as we have here in which no state has a right to tax the fleet at full value, each state through which the planes land and engage in interstate business may tax a part of their value, if it is fairly related to their use within the taxing state. The over-all result of the Northwest Airlines case is that where the owner of a fleet of airplanes engaged in interstate commerce is a corporation of the state levying the tax with its principal place of business and the home port of all its planes within the same state, such state may tax the full value of the planes. Whether or not the taxing of the whole value in such state operated to exempt them from taxation in other states in which they engage in interstate business is specifically reserved by the opinion and casts serious doubt on the right of other states to do so unless, possibly, evidence of a tax situs in other states would have called for a different result; in any event, the authority of Minnesota to tax the full value of the fleet of planes rests upon the express presumption that in flying in interstate commerce on regular schedules through several states they had not acquired a permanent taxable status elsewhere, although some of them had actually been taxed in other states. Whether this means the result would have been

different if it had been shown that there was a taxable situs in other states or, whether it means that multiple taxation of tangible property is to be allowed even though the aggregate assessment exceeds the full value of the property, remains unanswered. We assume the former, in view of the many holdings of the United States Supreme Court relative to multiple assessments in interstate commerce which exceed the full value of the property as being an undue burden under the Commerce Clause.

In the later case of *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585, the court sustained an apportioned ad valorem personal tax levy by the nondomiciliary state of Louisiana upon a fleet of vessels engaged in interstate commerce in inland waters. The facts show that the vessels in question came into New Orleans where they were left for unloading and reloading. They were operated on no fixed schedules but the turn-arounds were made as quickly as possible. They remained long enough to unload and take on cargo and to make necessary and temporary repairs. The State of Louisiana and the city of New Orleans levied ad valorem taxes on assessments based on the ratio between the total number of miles of lines in Louisiana and the total number of miles of all of the carrier's lines. In upholding the tax the court said: "It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders. * * * We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises." Paraphrasing the latter statement, "We can see no reason which should put air transportation on a different constitutional footing than other interstate enterprises."

In the subsequent case of *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427, 26 A. L. R. 2d 1371, the principle that vessels moving on inland waters in interstate commerce could be taxed by a state through which they passed on the basis of that portion of the value of the vessels represented by the ratio between the total number

of miles in the taxing state and the total number of miles in the entire operation is adhered to as a proper method of tax allocation. The Peck case distinguishes *Northwest Airlines, Inc. v. Minnesota*, supra, on the basis that it was not shown in the latter case that " 'a defined part of the domiciliary corpus' had acquired a taxable situs elsewhere." The further statement in the Peck case to the effect that "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile", appears to sustain an allocation tax in a case such as we have before us in which no part of the property taxed was in the domiciliary state during the tax year. The holding in the *Northwest Airlines* case that the tax in that case on the full value of the air fleet was valid is based on a premise that is wholly absent in the present one.

The case relied upon the most to sustain the allocation theory of taxing personal property used in interstate commerce is *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613. It involved a tax on Pullman cars that were continuously moving in and out of the State of Pennsylvania. The fundamental concepts which support the allocation theory of taxing personal property used in interstate commerce are set forth in this case. The legal fiction that all personal property has its situs at the owner's domicile is abandoned and the system of taxing it at the place at which it is used and by whose laws it is protected when it is employed in a business requiring continuous and constant movement from one state to another, is plainly and definitely announced. That this case is relied upon in the *Ott* and *Peck* cases is clear. For reasons stated in the *Pullman's Palace Car Company* case, we think the inland water transportation cases are particularly applicable. The court in the *Pullman* case said: "No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are

recognized public highways of trade and intercourse." Air transportation likewise requires no artificial roadways other than port facilities. The rule as to one would appear to be fully applicable to the other.

The plaintiff relies primarily upon the following cases to sustain its position. *Gibbons v. Ogden*, 9 Wheaton 1, 6 L. Ed. 23; *Smith v. Turner*, 7 Howard 282, 12 L. Ed. 702; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; *New York Central & H. R. R. Co. v. Miller*, 202 U. S. 584, 26 St. Ct. 714, 50 L. Ed. 1155; *Union Tank Car Co. v. McKnight*, 84 F. 2d 421; *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238; *City of Chicago v. Willett Co.*, 344 U. S. 574, 73 S. Ct. 460, 97 L. Ed. 333. We do not consider these cases controlling in the issue before us. A careful reading of some of them, however, indicates that they support the theory of the defendant. Some announce principles which have been abandoned in the natural course of change in our economic and transportation systems. Others are based on facts which clearly distinguish them from the present case while others involve a tax in no way resembling an ad valorem tax on personal property. The plaintiff also cites *Pullman's Palace Car Co. v. Pennsylvania*, *supra*, *Ott v. Mississippi Valley Barge Line Co.*, *supra*, *Northwest Airlines, Inc. v. Minnesota*, *supra*, and *Standard Oil Co. v. Peck*, *supra*, which in our opinion definitely sustain the position of the defendant as we have heretofore stated.

It seems clear, therefore, that Nebraska and other similarly situated states have the power to impose an apportioned ad valorem personal property tax upon the flight equipment of this plaintiff, which is engaged in interstate commerce within the taxing state, when it has been wholly and continuously outside the state of the owner's domicile and the assessed value of the property bears a fair and reasonable relation to the use made of it in such taxing state.

The petition alleges also that the statutes in question are unconstitutional in that they violate Article I, section 9, clause 6, and Article I, section 10, clause 3, of the Constitu-

tion of the United States. These questions appear to have been abandoned in the brief and oral argument. We hold, however, that the foregoing constitutional provisions were not violated on the basis of the authorities cited dealing with the alleged violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

The foregoing disposes of the only question raised by the petition. Plaintiff in its brief states: "Plaintiff contends such taxation by defendants is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, which vests in Congress the exclusive right to regulate commerce among the states, and the levy of such tax by the defendants constitutes regulation. No state constitutional question or other legal issue is presented for the Court's decision." We consequently limit the issue strictly to that raised by the petition. The plaintiff does not allege that the formula set forth in the statute produces an assessed value that does not bear a fair and reasonable relation to the use of the property within this state. That issue was not alleged, briefed, or argued by the plaintiff. We do not deem this issue to be before the court for its determination.

We find that the act is not violative of Article I, section 8, Clause 3, Article I, section 9, clause 6, or Article I, section 10, clause 3, of the Constitution of the United States, on the basis on which it is here challenged. The petition of the plaintiff is therefore dismissed.

Dismissed.

APPENDIX "B"

PERTINENT SECTIONS OF THE STATE STATUTES INVOLVED

CHAPTER 77

REVENUE AND TAXATION

RSN 1943, Reissue of 1950

77-1244. *Personal property; taxation of air transportation carriers; definitions.* As used in sections 77-1244 to 77-1246:

(1) The term "air carrier" means any person, firm, partnership, corporation, association, trustee, receiver or as-

signee, and all other persons, whether or not in a representative capacity, undertaking to engage in the carriage of persons or cargo for hire by aircraft; any air carrier as herein defined, engaged solely in intrastate transportation, whose flight equipment is based at only one airport within the state, shall be excepted from taxation under this section, but shall be subject to taxation in the same manner as other locally assessed property;

(2) The term "aircraft arrivals and departures" means (a) the number of scheduled landings and takeoffs of the aircraft of an air carrier, (b) the number of scheduled air pickups and deliveries by the aircraft of such carrier, and (c) in the case of nonscheduled operations, shall include all landings and takeoffs, pickups and deliveries;

(3) The term "flight equipment" means aircraft fully equipped for flight and used within the continental limits of the United States.

(4) The term "originating revenue" means revenue to an air carrier from the transportation of revenue passengers and revenue cargo exclusive of the revenue derived from the transportation of express or mail; and

(5) The term "revenue tons handled" by an air carrier means the weight in tons of revenue passengers and revenue cargo received and discharged as originating or terminating traffic.

Source: Laws 1947, c. 266 § 1, p. 858; Laws 1949, c. 231, § 5, p. 641.

77.1245. *Personal property; taxation of air transportation carriers; assessment; collection.* Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided,

that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within the state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period.

Source: Laws 1947, c. 266, § 2, p. 859.

77-1246. *Personal property; taxation of air transportation; laws applicable.* Real property and personal property, except flight equipment, of an air carrier shall be taxed in accordance with the applicable laws of this state.

Source: Laws 1947, c. 266, § 3, p. 860.

77-1247. *Personal property; taxation of air transportation carriers annual report; contents.* Each air carrier, as defined in section 77-1244, shall on or before June 1 in each year make to the Tax Commissioner a report, in such form as may be prescribed by the Tax Commissioner, containing the information necessary to determine the value of its flight equipment and the proportion allocated to this state for purposes of taxation.

Source: Law 1949, c. 231, § 1, p. 641.

77-1248. *Personal property; taxation of air transportation carriers; Tax Commissioner; report to State Board of Equalization and Assessment.* The Tax Commissioner shall ascertain from the reports made, and from any other information obtained by him, the value of flight equipment of air carriers and the proportion allocated to this state for the purposes of taxation, as provided in section 77-1245, and shall make a report thereof to the State Board of Equalization and Assessment as to each air carrier.

Source: Laws 1949, c. 231, § 2, p. 641.

77-1249. *Personal property; taxation of air transportation carriers; State Board of Equalization and Assessment;*

levy. The State Board of Equalization and Assessment shall each year make a levy for purposes of taxation against the value so ascertained and determined by the Tax Commissioner, as provided in section 77-1248, at a rate which shall be equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.

Source: Laws 1949, c. 231, § 3, p. 641.

77-1250. *Personal property; taxation of air transportation carriers; levy; collection; payment.* When levied, the tax shall be collected and paid in the same manner as the tax on car companies as provided in section 77-629 to 77-631.

Source: Laws 1949, c. 231, § 4, p. 641.

APPENDIX "C"

STIPULATION OF FACTS—Filed February 26, 1953

IN THE SUPREME COURT OF NEBRASKA

General Number 33260

MID-CONTINENT AIRLINES, INC., a Corporation, *Plaintiff*,

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT,
et al., *Defendants*

1. Plaintiff is a corporation, organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in said state. The principal object of its incorporation was and is the owning and operating of airplanes as carriers by air of persons and property for hire. From other states it operates its planes for such purposes on regularly scheduled stops in and out of the State of Nebraska. All its planes are fully equipped for flight through the air and are designed and constructed to descend from the air above to an airport built for the landing and taking off of such aircraft. Two such landing fields have been provided for such purpose in Nebraska, one by the

municipality of Omaha, and one by the municipality of Lincoln. At these air fields plaintiff neither owns nor maintains hangars for reconditioning, overhauling, repairing, or storing aircraft, its engines, or any of its flight equipment.

2. Plaintiff's principal activities in Nebraska consist of descending from the air above the state to unload persons and property from other states and promptly load persons and property in the same aircraft at the Omaha airport and ascend into the air and continue the scheduled flight through the air to the scheduled destinations in other states. There are fourteen of such flights in and out of Omaha each day. Plaintiff's aircraft move in a continuous circuit, so to speak, with planes moving in and out of the circuit from the overhaul base in Minnesota, there being constantly in use in the circuit all of plaintiff's aircraft which are not at the overhaul base; notwithstanding the fact that a particular plane may, during the course of its flight in the circuit, be given one or more flight numbers and thus a given flight be spoken of as originating and terminating at specified cities.

3. Since July 15, 1951, the plaintiff has been authorized by the Civil Aeronautics Administration of the United States, for a trial period of three years, to land at the airport at Lincoln, Nebraska, on two southbound flights through Omaha while en route to Missouri and points beyond, and on two flights from Missouri while en route to Omaha and points in other states to the north. Consequently, persons and property may be loaded on such flights at Omaha for Lincoln and at Lincoln for Omaha.

4. Mid-Continent Airlines and Braniff Airways, Incorporated, which were consolidated effective about August 1, 1952, operate 7,336 unduplicated route miles over the air lanes, serving sixty communities in the United States plus Latin American and Mexican routes.

5. The plaintiff operates fourteen flights through Omaha, Nebraska, as above stated, as follows:

Mid-Continent Airlines, Incorporated Flight Data

Listed below are all the scheduled flights of Mid-Continent Airlines as operated through Omaha, Nebraska. This data

gives the originating station of each flight and the arrival and departure times into and out of Omaha, Nebraska, showing the next scheduled stop beyond Omaha, Nebraska.

These flights are separated into southbound and northbound flights.

Southbound

Flight Number

23. Originates in Omaha, Nebraska, 7:00 a. m., arriving in Lincoln, Nebraska, 7:27 a. m., flying non-stop to St. Joseph, Missouri, then to Kansas City, Missouri and St. Louis, Missouri. Equipment used on this flight leaves Minneapolis/St. Paul, Minnesota, 7:00 p. m. the evening before and arrives in Omaha, Nebraska, 9:55 p. m., after scheduled stops in Sioux Falls, South Dakota and Sioux City, Iowa.

395. Originates in Minneapolis/St. Paul, Minnesota, 7:25 a. m., making scheduled stops at Sioux Falls, South Dakota and Sioux City, Iowa, arriving in Omaha, Nebraska at 9:47 a. m. This flight leaves Omaha 10:07 a. m., flying non-stop to Kansas City, Missouri, then to Tulsa, Oklahoma, and Houston, Texas.

39. Originates in Minneapolis/St. Paul, Minnesota, 11:30 a. m., with scheduled stops in Sioux Falls, South Dakota and Sioux City, Iowa, and arrives in Omaha, Nebraska, 2:25 p. m. This flight leaves Omaha 2:40 p. m., flying non-stop to St. Joseph, Missouri and then to Kansas City, Missouri.

97. Originates in Minneapolis/St. Paul, Minnesota, 2:30 p. m., flying non-stop to Omaha, Nebraska, arriving 4:14 p. m. This flight leaves Omaha 4:29 p. m., flying non-stop to Kansas City, Missouri and to Houston, Texas.

9. Originates in Minneapolis/St. Paul, 4:15 p. m., with scheduled stops at Watertown, Huron, and Sioux Falls, South Dakota; and Sioux City, Iowa, and arrives in Omaha, Nebraska, 8:37 p. m. This flight departs from Omaha 8:52 p. m. and arrives in Lincoln, Nebraska, 9:19 p. m., leaving Lincoln, 9:24 p. m., flying non-stop to Kansas City, Missouri.

319. Originates in Minneapolis/St. Paul, 8:50 p. m., flying non-stop to Omaha, Nebraska, arriving 10:09 p. m.

This flight leaves Omaha 10:29 p. m., flying non-stop to Kansas City, Missouri.

Northbound

Flight Number

16. Originates in Kansas City, Missouri, 7:40 a. m., flying non-stop to Omaha, Nebraska, arriving 8:45 a. m. This flight leaves Omaha 9:00 a. m., flies non-stop to Sioux City, Iowa, and then to Sioux Falls, Huron and Watertown, South Dakota; and terminates in Minneapolis/St. Paul, Minnesota.

18. Originates in Kansas City, Missouri, 9:15 a. m., flying non-stop to Omaha, Nebraska, arriving in Omaha 10:20 a. m. This flight leaves Omaha 10:35 a. m., flying non-stop to Minneapolis/St. Paul, Minnesota.

4. Originates in Kansas City, Missouri, 12:15 p. m., stopping in St. Joseph, Missouri, arriving in Lincoln, Nebraska, 1:36 p. m. This flight leaves Lincoln 1:41 p. m., arriving in Omaha 2:08 p. m. This flight leaves Omaha 2:23 p. m., flying non-stop to Sioux City, Iowa.

302. Originates in Kansas City, Missouri, 2:45 p. m., flying non-stop to Omaha, arriving 3:35 p. m. This flight leaves Omaha, 3:50 p. m. and flies non-stop to Minneapolis/St. Paul, Minnesota.

381. Originates in St. Louis, Missouri, 3:30 p. m. after stopping in Kansas City, Missouri and St. Joseph, Missouri, it arrives in Lincoln, Nebraska 6:41 p. m. This flight leaves Lincoln 6:46 p. m., and arrives in Omaha, 7:13 p. m. This flight leaves Omaha 7:28 p. m., flies non-stop to Sioux City, Iowa and then to Sioux Falls, South Dakota, and Minneapolis/St. Paul, Minnesota.

300. Originates in Kansas City, Missouri, 5:30 p. m., and flies non-stop to Omaha, Nebraska, arriving 6:20 p. m. This flight leaves Omaha, Nebraska 6:40 p. m., flying non-stop to Minneapolis/St. Paul, Minnesota.

322. Originates in Kansas City, Missouri, 9:45 p. m., flying non-stop to Omaha, Nebraska, arriving 10:35 p. m. This flight leaves Omaha, 10:55 p. m., flying non-stop to Sioux City, Iowa and Sioux Falls, South Dakota and then on to Minneapolis/St. Paul, Minnesota.

Daily Aircraft Time in Nebraska as Compared
with Total System Aircraft Time

	Flight No.	Nebraska Time		Total
		Air	Ground	
1. Southbound	23	1:09	:05	1:14
2.	395		:20	:20
3.	39		:15	:15
4.	97		:15	:15
5.	9	1:09	:20	1:29
6.	319		:20	:20
7.	7		9:05	9:05
8. Northbound	16		:15	:15
9.	18		:15	:15
10.	4	1:09	:20	1:29
11.	302		:20	:20
12.	38	1:09	:20	1:29
13.	300		:20	:20
14.	322		:20	:20
Total		4:36	12:50	17:26
System Total (27 x 24:00)				648:00
Ratio—Nebraska to System				2.70%

Eight aircraft operate the above schedules in normal rotation.

6. Miles traveled by passengers originating and terminating in Nebraska compared with system passenger miles—July 15, 1951, to January 31, 1952:

Passenger Miles of Passengers Originat- ing and Terminating in Nebraska	Passenger Miles Mid-Continent System	Ratio of Nebraska to System
39,215	84,605.029	.046%

7. Revenue derived from passengers originating and terminating in Nebraska as compared with system passenger revenue—July 15, 1951, to January 31, 1952:

Passenger Revenue of Passengers Originat- ing and Terminating in Nebraska	Passenger Revenue Mid-Continent System	Ratio of Within Nebraska Income to System Income
\$2,404.68	\$4,750,440.09	.051%

8. The mileage is ninety miles from Lincoln, Nebraska, to the state's border near Rulo, Nebraska, and it takes forty-two minutes to fly that distance. There are four such flights daily. Most of the flights, being those in and out of Omaha, Nebraska, take off and enter the state in a matter of seconds

because the Omaha airport adjoins the Missouri River, which is the state boundary, and the flights come over the river and go out over the river to and from other states, except the flights above described to Lincoln since July 15, 1951. Each aircraft is on the ground at the airport to load and unload passengers and freight from five to twenty minutes, except the one flight per day leaving Minneapolis at 7:00 p. m., arriving in Omaha at 9:55 p. m., leaving Omaha at 7:00 a. m., arriving in Lincoln at 7:27 a. m., and from there the plane goes to points in Missouri and south in interstate commerce.

Summary of Carriage of Persons and Property
between Lincoln and Omaha, Nebraska
July 15, 1951, to January 31, 1952

	Mail Pounds	Express Pounds	Freight Pounds	Number of Passengers
In Nebraska	11,906	5,319	4,864	713
System total	2,084,447	1,362,379	1,946,824	262,075
Ratio	.571%	.390%	.250%	.271%

9. Plaintiff's main executive offices were in Kansas City, Missouri, and are now in Dallas, Texas, owing to a consolidation of Mid-Continent Airlines, Inc., with Braniff Airways, Incorporated, which took place on or about August 1, 1952. Braniff Airways is a corporation organized and existing under the laws of the State of Oklahoma with its corporate place of business at Oklahoma City in said state and with its main executive offices at Dallas, Texas, and is organized for the same objects and purposes as plaintiff. Accordingly, the caption in this cause shall be "Mid-Continent Airlines, Inc., now Braniff Airways, Incorporated," versus the defendants named. The defendants as named in the caption are the proper party defendants in this action.

10. The home port of plaintiff is and at all times mentioned herein has been at the Minneapolis-St. Paul airport, known as the Wold-Chamberlain Air Field, where plaintiff maintains repair shops, machinery, equipment, and hangars. To this port each of the aircraft, with all its flight equipment that alights from the air above Nebraska and ascends into the air from Nebraska, must be flown at designated times for governmental inspection, repairs, maintenance,

tests, overhauling, and storage when not in use. None of such home port facilities were or are located in Nebraska. All aircraft of plaintiff must be returned to said home port at Minneapolis-St. Paul for governmental inspection and overhauling and relicensing before a period of fifty hours has expired on the engines and plane under the Civil Aeronautics Administration rules, under the authority of the Civil Aeronautics Code (49 USCA Ch. 9, § 401-705).

11. The plaintiff's aircraft are flown through the air within the limits of aerial highways, specifically described and assigned by the United States Civil Aeronautics Administration to the plaintiff. Said aerial space is so described and outlined by said Administration as the fixed air lanes in which plaintiff's ships are required to fly when going from state to state into and from Nebraska. Said Administration issues, upon examination, the licenses for the aircraft, its engines, propellers, and all its flight equipment, including radio and all communication devices from and to the aircraft. Likewise, the Administration licenses the pilots and all personnel engaged in flight. All aircraft, engines, radio, communication apparatus, and flight equipment must fly to the Minneapolis-St. Paul home port of plaintiff, where all are located.

12. At the Omaha Municipal Airport the federal government, acting through said Administration, has constructed and maintains an airport traffic control tower at which there is stationed a chief airport controller and eleven assistants, all of whom are employed and paid by the United States at a payroll expense of about \$50,000 per year. This personnel and the equipment used are so stationed for the purpose of directing and controlling aircraft coming into or departing from the Omaha airport. Each aircraft of plaintiff coming into the airport receives, when about ten minutes out from Omaha, preliminary landing instructions, and is told by the government controller which landing runway to use and is given the traffic pattern, or may be instructed not to land. These government aircraft controllers at the Omaha airport are likewise in constant communication with other major aircraft control towers

spaced throughout the parts of the United States directing flight in the air lanes through which plaintiff's planes are licensed and restricted to fly and from which they may descend and ascend in pursuance of their government licensed course and government approved schedules. These federal air lanes are laid out across the country and normally connect major air terminals. These air lanes are approximately ten miles wide and are established north, south, east, and west. Each air carrier has been granted certain priority authority. Radio facilities are provided by the government along these air lanes to direct all air traffic from one point to another. For planes not equipped with radio, the government provides and operates a radio beam. Also about each twenty miles on the ground are electrically operated beacons indicating that the designated air lane is above that light.

13. All violations of rules and regulations of the Civil Aeronautics Administration or of the Civil Aeronautics Code may be reported to the Administration by any person concerned. Violations of landing and take-off regulations at an airport in Nebraska or elsewhere are by law federal offenses under the Civil Aeronautics Code. Such violations are punishable as by the law provided in the federal courts. (49 USCA § 560, 610(a), 623; 61.306, 60.18(c) of Civil Air Regulations.)

14. The plaintiff's aircraft, which land from the air lanes above and take off into them from the Nebraska airports, are each engaged as federally licensed air carriers of mail, persons, and property between the States of North Dakota, Minnesota, South Dakota, Iowa, Wisconsin, Illinois, Nebraska, Colorado, Missouri, Oklahoma, Arkansas, Tennessee, Louisiana, Texas, and now Mexico and South America.

15. At the close of the year 1951 the total operating revenue of plaintiff (Mid-Continent) was \$9,818,363. Total operating expense was \$9,508,859. Net profit after taxes was \$135,941. The revenue miles flown were 9,556,459. The revenue passengers carried were 441,115. The pounds of mails and cargo carried were 10,200,000.

16. The gross income from passengers for 1951 was

\$7,681,760.80; from mail, \$1,608,590.65; from freight, express, and excess baggage, \$331,261.23; from chartered planes and other transportation, \$171,037.96; and from miscellaneous sources, \$25,712.68. Total for 1951, \$9,818,363.32.

17. Capitalization (Mid-Continent): Common stock issued and outstanding, 418,755 shares par value \$1.00; debentures due May 1, 1954, \$50,000; May 1, 1959, \$100,000; May 1, 1962, \$150,000; May 1, 1963, \$1,000,000.

18. Plaintiff pays approximately \$22,000 per year for depot rental space, landing fees, and other facilities at the Municipal Airport in Omaha.

19. In addition to the \$22,000 per year, the plaintiff pays two and a half cents per gallon tax on gasoline fuel supplied to its aircraft at Omaha. In 1951, 567,000 gallons were taken on in Omaha, resulting in a net tax to the State of Nebraska of \$14,180.00.

20. The personal property of plaintiff, such as office furniture and equipment, auto trucks, and all similar property, is taxed in Douglas County. Also such property would be taxed in Lancaster County, if any such property is there located. In Douglas County this tax is \$200 to \$300 per year. Comparable amounts are paid in other municipalities in other states where the aircraft land and take off.

21. In a return made by plaintiff to the defendant Board for taxation for 1950, 9% of the total was given as the proper per cent of revenue originating in Nebraska based on ticket sales, and 11½% of the total system tonnage originated in Nebraska for 1950.

22. The plaintiff made out and filed its return under forms furnished by the defendant Tax Commissioner for 1950, and the assessment was as follows. The Mid-Continent Airlines assessment for 1950 was compiled by the defendant Tax Commissioner from forms filled out, signed, and returned by the plaintiff. The tax for 1950 was \$4,280.44, and it remains unpaid. The defendants fixed as the valuation figure \$118,901.00 for plaintiff's flight equipment for Nebraska. The rate of levy was 36 mills, resulting in the

tax of \$4,280.44 for 1950. The valuation was determined by the Tax Commissioner as follows:

Airline Assessments 1950

Mid Continent Airlines

1. System Value Formula

A. Five Year Average Net Operating Income Capitalized at 6%	\$5,484,350
B. Five Year Ave. Mkt. Value of Stocks and Bonds	3,927,634
C. Book Value Depreciated Cost Basis	707,864
Average of A, B, and C or System Value	3,373,283

2. Flight Equipment Apportionment Formula

A. Ratio of Flight Equipment Cost (Sec. B) to Total Operating Property Cost (Sec. F) ..	1,771,360	61.1%
	2,899,660	
B. Ratio of Depreciated Cost Value of Flight Equipment (Sec. C) to Depreciated Cost Value of Total Operating Property (Sec. F) ..	237,322	33.5%
	707,864	
Average of A and B or Apportionment Factor		47.3%

3. Allocation Formula

A. Ratio of Arrivals and Departures within Nebraska to Total Arrivals and Departures ..	10,306	9.032
	114,104	
B. Ratio of Revenue Tons Handled in Nebraska to Total Revenue Tons Handled	8,008	11.541
C. Ratio of Revenue Originating within Nebraska to Total Revenue	69,389	9.235
	537,894	
	5,824,803	
Average of A, B and C or Allocation Factor		9.936

4. Allocated Value (Result of System Value \times Apportionment Factor \times Allocation Factor $3,373,283 \times 47.3 = 1,595,563 \times 9.936 = 158,535$)

5. Equalized value $\$158,535 \times 75\% = \$118,901$

23. For the year 1951 the plaintiff failed to file the return, and defendants accordingly used the same ratio formulae for 1951 as returned for 1950, changing only the mill levy from 36 to 38, which was the average levy throughout the whole state for 1951. The mill levy is obtained by the defendants' computing the total amount of property taxes levied in the state and dividing that total by the total assessed valuation of property for the state, and that resulted in the mill levy of 36 and 38 respectively, for 1950 and 1951. For the year 1951 the tax assessed was \$4,518.29, which re-

mains unpaid. These taxes are drawing interest and penalties as by law provided.

24. The tax in question is assessed only against regularly scheduled air carriers upon their flight equipment, which is the fully equipped airplane, operating from without the State of Nebraska and into and out of Nebraska, and is not applied to carriers who operate only intermittently in the State of Nebraska in flights from and back to a fixed base in Nebraska. Such planes are assessed by the local county assessors in the county in which the base is located.

25. The State Tax Commissioner, in Assessing plaintiff's aircraft and arriving at the ratios and the resulting tax, followed the state statutes which the Attorney General advised were applicable, and used the unit rule to arrive at the whole system value, and then used the statutory ratios to determine the valuations for Nebraska. It is these sections of the Nebraska law that are now under attack as unconstitutional under the Federal Constitution, as set forth in the petition on file herein. The defendants' position is made clear by their answer on file herein. The taxing statutes in question are copied herein as follows:

CHAPTER 77

REVENUE AND TAXATION

RSN 1943, Reissue of 1950

77-1244. *Personal property; taxation of air transportation carriers; definitions.* As used in section 77-1244 to 77-1246:

(1) The term "air carrier" means any person, firm, partnership, corporation, association, trustee, receiver, or assignee, and all other persons, whether or not in a representative capacity, undertaking to engage in the carriage of persons or cargo for hire by aircraft; any air carrier as herein defined, engaged solely in intrastate transportation, whose flight equipment is based at only one airport within the state, shall be excepted from taxation under this section, but shall be subject to taxation in the same manner as other locally assessed property;

(2) The term "aircraft arrivals and departures" means (a) the number of scheduled landings and takeoffs of the aircraft of an air carrier, (b) the number of scheduled air pickups and deliveries by the aircraft of such carrier, and (c) in the case of nonscheduled operations, shall include all landings and takeoffs, pickups and deliveries;

(3) The term "flight equipment" means aircraft fully equipped for flight and used within the continental limits of the United States.

(4) The term "originating revenue" means revenue to an air carrier from the transportation of revenue passengers and revenue cargo exclusive of the revenue derived from the transportation of express or mail; and

(5) The term "revenue tons handled" by an air carrier means the weight in tons of revenue passengers and revenue cargo received and discharged as originating or terminating traffic.

Source: Laws 1947, c. 266, § 1, p. 858; Laws 1949, c. 231, § 5, p. 641.

77-1245. *Personal property; taxation of air transportation carriers; assessment; collection.* Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period: Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within the state

for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period.

Source: Laws 1947, c. 266, § 2, p. 859.

77-1246. *Personal property; taxation of air transportation; laws applicable.* Real property and personal property, except flight equipment, of an air carrier shall be taxed in accordance with the applicable laws of this state.

Source: Laws 1947, c. 266, § 3, p. 860.

77-1247. *Personal property; taxation of air transportation carriers; annual report; contents.* Each air carrier, as defined in section 77-1244, shall on or before June 1 in each year make to the Tax Commissioner a report, in such form as may be prescribed by the Tax Commissioner, containing the information necessary to determine the value of its flight equipment and the proportion allocated to this state for purposes of taxation.

Source: Laws 1949, c. 231, § 1, p. 641.

77-1248. *Personal property; taxation of air transportation carriers; Tax Commissioner; report to State Board of Equalization and Assessment.* The Tax Commissioner shall ascertain from the reports made, and from any other information obtained by him, the value of flight equipment of air carriers and the proportion allocated to this state for the purposes of taxation, as provided in section 77-1245, and shall make a report thereof to the State Board of Equalization and Assessment as to each air carrier.

Source: Laws 1949, c. 231, § 2, p. 641.

77-1249. *Personal property; taxation of air transportation carriers; State Board of Equalization and Assessment; levy.* The State Board of Equalization and Assessment shall each year make a levy for purposes of taxation against the value so ascertained and determined by the Tax Commissioner, as provided in section 77-1248, at a rate which shall be equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.

Source: Laws 1949, c. 231, § 3, p. 641.

77-1250. *Personal property; taxation of air transportation carriers; levy; collection; payment.* When levied, the tax shall be collected and paid in the same manner as the tax on car companies as provided in sections 77-629 to 77-631.

Source: Laws 1949, c. 231, § 4, p. 641.

26. The tax collected from air carriers flying in and out of Nebraska under the act is used for the general expenditures of the state. In making the levy based upon the valuations and ratios above set forth, no ratio is determined by the defendants in intrastate to interstate business carried on by the plaintiff in Nebraska.

27. The rate of tax levy imposed upon plaintiff's flight equipment, pursuant to the legislative enactment here in question, is equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.

Dated at Omaha, Nebraska, February 24, 1953.

MID-CONTINENT AIRLINES, INC.,
CORPORATION,

Plaintiff;

(S.) by WILLIAM J. HOTZ,

HOTZ & HOTZ,

Its Attorneys,

1530-5 City National Bank Building,

Omaha 2, Nebraska;

Dated at Lincoln, Nebraska, February 26, 1953.

NEBRASKA STATE BOARD OF
EQUALIZATION AND ASSESS-
MENT, ET AL.,

Defendants;

By CLARENCE S. BECK,

Attorney General;

(S.) by C. C. SHELDON,

Assistant Attorney General.

FILED

FEB 18 1954

HAROLD B. WILLEY, C

**In the
Supreme Court of the United States**

—○—
October Term, 1953
No. 476
—○—

BRANIFF AIRWAYS, INCORPORATED,

Appellant,

VS.

NEBRASKA STATE BOARD OF EQUALIZATION
AND ASSESSMENT, ET AL.,

Appellees.

—○—
**APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEBRASKA**

—○—
BRIEF OF APPELLANT
—○—

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**In the
Supreme Court of the United States**

October Term, 1953

No. 476

BRANIFF AIRWAYS, INCORPORATED,

Appellant,

vs.

**NEBRASKA STATE BOARD OF EQUALIZATION
AND ASSESSMENT, ET AL.,**

Appellees.

**APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEBRASKA**

BRIEF OF APPELLANT

Opinion Below

The Supreme Court of the State of Nebraska filed its final opinion on July 17, 1953. An exact copy is included in an appendix to this brief (App. A). It is printed in the record as R. 25-35, and is officially reported in 157 Neb. 425, 59 N. W. 2d 746. Jurisdiction was noted herein on January 4, 1954 (R. 56).

Jurisdictional Statement

1. The jurisdiction of this Court is based upon Title 28, United States Code, Section 1257(2). In the court below there was "drawn in question the validity of a" taxing statute of the State of Nebraska on the grounds of repugnancy to the Constitution of the United States, and the decision below was "in favor of its validity."

2. Specifically and directly, Article I, Section 8, Clause 3, of the Constitution of the United States was drawn in question below and now on appeal. Indirectly and for comparative application to the facts, there were drawn in question below, and now on appeal, Article I, Section 9, Clauses 5 and 6, and Article I, Section 10, Clauses 2 and 3, of the Constitution of the United States (R. 1, Par. 2; R. 5, Par. 1; R. 6, Par. 2; R. 25, Judgment; R. 26, Par. 2; R. 34-5).

3. The Nebraska taxing statute in question directs the defendants-appellees to assess an ad valorem tax on appellant's aircraft which alighted in Nebraska during regularly scheduled interstate commercial flights. The statute is copied in full in the appendix to this brief (App. B) and in the record as R. 20. It is Sections 77-1244 to 77-1250, R. R. S. Nebraska 1943, as amended. The first tax assessed thereunder was for 1950, and similar assessments have been made annually and are continuing to be made annually. All assessments are unpaid (R. 18, Par. 22; R. 19, Par. 23; Stip. R. 47).

4. These ad valorem taxes on appellant's aircraft while engaged in interstate flight are contested by this action on the federal constitutional grounds presented.

Questions Presented

1. The question presented is whether or not the aforementioned final opinion of the Supreme Court of Nebraska (App. A) should be reversed because the above-cited ad valorem taxing statute (App. B) is repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States.

2. It appears from a Stipulation of Facts attached hereto (App. C and R. 10) and from the findings in the opinion of the court below (App. A) that the appellees, which are the taxing body and its officials, have assessed and will enforce by levy an ad valorem tax upon the aircraft of the appellant, as defined in the statute unless the State act (App. B and R. 20) is declared invalid by this Court.

3. Appellees' basis for the tax is solely the statute in question. The facts are that the aircraft descend from the airways above Nebraska to an airport in Nebraska and leave by the airways above Nebraska in pursuit of interstate commerce missions. Appellees assert that such activity justifies, under the statute, the assessment made and being made. There were and are fourteen such stops at the Omaha (Nebraska) Airport, each is from five to twenty minutes duration. On these facts only appellees have assessed the statutory defined proportional valuation of each such aircraft for ad valorem taxation.

4. In considering the question presented, it affirmatively appears that the State of Nebraska is neither the home port nor the State of creation of the appellant, Braniff Airways, Incorporated, or its predecessor, Mid-

Continent Airlines, Inc. Each aircraft, as it alights and takes off, does so at the previously designated (Omaha) airport within Nebraska. The appellant pays the City of Omaha a standard contractual charge for these airport landings which amounted to \$22,000 in 1950 (App. C). This charge is based upon the number of landings and take-offs made by appellant's aircraft at the airports in Nebraska. Appellant also pays an ad valorem tax upon all its personal property located in the State. A gasoline tax of \$14,180 was assessed and paid for 1951, which tax is used for betterment of airport facilities in the State. All these facts were stipulated below and on this appeal (App. C; R. 27 and R. 17, Par. 19). The only tax contested is the ad valorem tax on the aircraft coming into and leaving Nebraska in interstate commerce (App. B and R. 20; App. A and R. 26).

5. In deciding the constitutional question, the Court may accept as a conclusion of law from the opinion below (App. A) and the Stipulation of Facts (App. C) that each aircraft was assessed while engaged in interstate commerce; that these aircraft are the sole incident of the tax in question; that the tax is based upon the Nebraska proportion of a system valuation under formulae set forth in the act (App. B and R. 20).

6. Appellant presents the fact under the stipulation that said aircraft have attained at no time a taxable situs within the State. In consequence thereof, no proportional valuation of the aircraft may legally be assessed. The tax was assessed for no use, no privilege, and no legal right granted, nor protection, nor reciprocal benefit inherent in the tax (App. C, par. 25, 26, 27).

7. Consequently, the question presented: *Generally*—(A) Is the tax assessed invalid and repugnant to the Commerce Clause of the Federal Constitution as burdening the interstate flight of appellant's aircraft while on interstate commerce missions at the (Omaha) Nebraska airport, for which right to use the airport it pays?

7. (B) The question presented is extended to the consideration of whether or not, from the effective date of the United States Civil Aeronautics Code, June 23, 1938 (52 Stat. 977, et seq., Title 49, U. S. C., Ch. 9, Secs. 401-705), the Congress of the United States has pre-empted for the Government the entire field of aviation, and particularly the aircraft in question in flight operations among the States.

8. *Specifically*—(1) Has Congress removed aircraft, which are pursuing interstate flight under the rules and regulations of the congressional act, from the power of a state to tax the aircraft so engaged for general revenue-producing state purposes, unrelated to use, supervision, welfare, police power, or reciprocal benefits?

8. (2) Does the word "regulation" contained in the Commerce Clause of the Federal Constitution preclude a state from assessing and enforcing an ad valorem tax on aircraft alighting from the air above Nebraska and ascending into it for essential engagement in commerce among the states?

8. (3) Does the alighting and ascending of the aircraft on fourteen daily regularly scheduled interstate flights to and from the state change the answer to either of questions 8 (1) and 8 (2), when it appears that the stops

at the airport were five to twenty minutes each, sometimes to refuel, and always to load and unload persons and property coming and going in interstate commerce and for no other purpose? (App C.)

8. (4) Does Section 403 of the congressional act (52 Stat. 980, 49 U. S. C., Ch. 9) dated June 23, 1938, reading,

“There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States,”

apply to the aircraft and the appellant owner in the case at bar? If so, does such declaration pre-empt the aviation field for taxation by Congress alone to the extent of nullifying the State ad valorem tax statute in question?

8. (5) Did not the State of Nebraska enact the tax statute in question in 1949 (App. B), effective 1950, on the erroneous assumption that the air above Nebraska was within its taxing jurisdiction?

8. (6) Did not the highest court of Nebraska err in its application of the law announced in its opinion (App. A), when it adopted law applicable to those instrumentalities of commerce that had (a) attained a taxable situs in the state when traversing the lands, streams, or highways therein, or (b) derived benefits from the State for taxable uses for facilities, privileges, and protection made available by the State?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States:

Constitution:

Article I, Section 8, Clause 3—Congress alone may regulate commerce among states, and to regulate includes to tax.

Article I, Section 9, Clause 5—Prohibits tax on exports from any state; Clause 6—“No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another.”

Article I, Section 10, Clause 2—“No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.”

Clause 3—“No state shall, without the consent of Congress, lay any duty of tonnage, * * *”

Title 28, U. S. C., Sec. 1257(2)—Jurisdiction by appeal.

Civil Aeronautics Code

52 Stat. 977, et seq.; Title 49 U. S. C., Ch. 9, Sec. 401-705. Adopted June 23, 1938.

Epitomization of Aeronautics Code

Subchapter I—Sec. 401, Definitions; Sec. 402, Declaration of Policy of the United States to regulate and control civil aeronautics over the navigable air space of the United States; Sec. 403, Public right of transit in the navigable air space of the

United States made certain to any citizen of the United States as a part of the public domain.

Subchapter II—Organization of Civil Aeronautics Board, Secs. 421-427.

Subchapter III—Powers and duties of Administrator of Civil Aeronautics to foster air commerce; Sec. 452, creation of civil airways and facilities, establishment of airways, duties of Administrator in reference thereto; Sec. 453, the expenditure of Federal funds therefor; Sec. 454, establishment by the Government of meteorological service to provide for the safe and efficient movement of aircraft in air commerce; Sec. 455, supervision and development to improve air navigation facilities for aircraft, its engines, propellers, and appliances; Sec. 456, collection and dissemination of information in reference thereto; Secs. 457-60, development, planning, and detailing of certain Government employees for additional training, and operating of training schools for the employees under the C. A. Act to supervise and regulate commercial aviation, with powers to investigate and proceed to enforce the delegation of powers in reference to commercial aviation set forth by Congress in the act.

Subchapter IV—Air Carrier Economic Regulation—Secs. 481-2, the right to adjudge issuance of certificates of public convenience and necessity essential to carry on air commerce in aircraft; Secs. 483-4, tariffs and rates to be filed and supervised by the Government; Secs. 485-6, transportation of mail regulated and supervised by the CAB; Sec. 488, consolidation and mergers regulated and supervised by CAB in reference to all commercial aviation; Sec. 490, conditions for loans and financial aid and regulation of same by CAB; Sec. 495, inquiry into air carrier management; Sec. 496, classification of air carriers.

Subchapter V—Nationality and Ownership of Aircraft—Secs. 521-4, registration of engines, propellers, and appliances, and the licensing and inspection of the same, including safety regulation under Federal regulation and licensing.

Subchapters VI and VII, Secs. 551-82, extensive and far-reaching air safety regulations, including the investigation of accidents, with power to act in reference thereto.

Subchapter VIII—Secs. 601-3, other administrative agencies of the Federal Government for aid and supervision of aviation, such as the weather bureau and Presidential powers regarding overseas commercial flights.

Subchapter IX—Secs. 621-2, Penalties, both civil and criminal, in reference to violations of the C. A. Code; Sec. 623, definition of venue and prosecution of offenses.

Subchapter X—Sec. 641-45, procedure for conduct of proceedings before Board; Sec. 646, judicial review of the action of the CAB under the Code; Sec. 647, judicial enforcement of the action of the Board.

Subchapter XI—Miscellaneous powers of the Government; Sec. 671, power to remove any hazards to air commerce anywhere after hearing and determination by the CAB.

Subchapter XII—Secs. 701-4, Agency which will encourage and permit the maximum use of civil aircraft consistent with national security.

Chapter XIV (60 Stat. 170-80, Title 49 U. S. C., Secs. 1101-1119)—providing for federal aid to airports, and also the financing for commercial use of national airports throughout the nation and in foreign countries.

The extent of governmental aid to aviation is reviewed in U. S. Code Congressional and Administrative

Service, Vol. 2, 1950, p. 3945; "Federal Airport Act," House Report No. 2709, and in Vol. 1, 1950, p. 1063; and in Vol. 2, 1950, p. 3998, Text of Act, Vol. 1, 1950, p. 1084, "To Promote the Development of Commercial Aircraft and to Declare the Policy of Congress to promote and finance experiments in aid of safety and betterment of aircraft."

(The foregoing outline of the C. A. Code illustrates appellant's position that the Federal Government has undertaken supervision of all commercial flight activities to the exclusion of the states. The legal result, with supporting cases, is set forth in the following Specification of Errors and Law Points and discussed in the Arguments.)

Nebraska Statutes:

Ch. 77, R. R. S. Nebraska 1943, Sec. 1244-1250; statute involved on this appeal. Copied in full, App. B hereof and R. 20.

STATEMENT OF THE CASE

1. There is appended to this brief and set forth in the record the opinion below (App. A and R. 25) and the Nebraska taxing statute (App. B and R. 20) claimed by appellant to be repugnant to the Commerce Clause of the Federal Constitution. The court below upheld the statute. There was a Stipulation of Facts (App. C; R. 10) upon which the court below rendered its opinion and which is presented to this Court as the facts for this appeal.

2. In stating the case below the Nebraska Supreme Court in its opinion set forth the following facts, which

are the same as the Stipulation of Facts (App. C) and accordingly are submitted to this Court as an acceptable recitation of facts.

"This is an original action for a declaratory judgment commenced in this court to test the validity of sections 77-1244 to 77-1250, R. R. S. 1943. Such Sections of the statutes authorize the assessment, levy, and collection of an ad valorem personal property tax against plaintiff's flight equipment used in interstate commerce. Plaintiff contends that such taxation violates Article I, section 8, clause 3, of the Constitution of the United States, commonly referred to as the Commerce Clause. The defendants deny the unconstitutionality of the Nebraska act and assert the right to impose an ad valorem personal property tax upon plaintiff's flight equipment which is used within the state as a part of a system of interstate air commerce over fixed routes on regular schedules, so long as the allocation of the proportionate part of the property value and the levy thereon bear a fair and reasonable relation to the use of such flight equipment within the state. Briefly this constitutes the issue before the court.

"Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in that state. The main executive offices of the plaintiff were in Kansas City, Missouri, until the consolidation of plaintiff with the Braniff Airways, Incorporated, was effected on or about August 1, 1952, at which time such offices were moved to Dallas, Texas. It is stipulated that Braniff Airways, Incorporated, is substituted for Mid-Continent Airlines, Incorporated, as the party plaintiff. The home port to which all its fleet of planes must return is Minneapolis and St. Paul, Minnesota. Plaintiff is licensed by the Civil Aeronautics Board of the United States to engage in interstate transportation by air for hire under the

provisions of Title 49, U. S. C. A., sections 401 to 705. Pursuant to such authority it operates a large number of aircraft upon regular schedules in trunk line flight from Minot, North Dakota, to New Orleans, Louisiana, making regular landings in North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Illinois, Kansas, Missouri, Oklahoma, Arkansas, Texas, and Louisiana. No planes land in plaintiff's domiciliary state of Delaware. Plaintiff operates over 7,336 of unduplicated route miles. Plaintiff's activities in Nebraska consist of making landings at Omaha and Lincoln on regularly scheduled stops on interstate flights. There are 14 of such flights in and out of Omaha each day and 4 such flights in and out of Lincoln. These stops are made to handle mail, express, freight, and passengers and are usually of short duration, generally from 5 to 20 minutes. The home port for all planes here involved is the Wold-Chamberlain Air Field at St. Paul, Minnesota, where hangars, repair shops, and equipment are maintained. Municipal and federal government facilities are used at Omaha and Lincoln. The flight distance from Omaha to Lincoln is 60 miles and from Lincoln to Rulo it is 90 miles, these being the only routes traveled by any of plaintiff's planes in Nebraska within the limits of aerial routes specifically assigned by the Civil Aeronautics Administration. It is not disputed that plaintiff's operations are interstate in character and are subject to regulation by the federal government as an interstate common carrier. The gross income of plaintiff for 1951 was \$9,818,363, and the net profit was \$135,941. The income from the carriage of passengers, mail, freight, express, excess baggage, chartered planes, and miscellaneous sources is set forth in the record by stipulation. Plaintiff pays for depot rental space at Omaha in the amount of \$22,000 a year, and a tax of 2½ cents a gallon on gasoline used, which amounted to \$14,180 in 1951. The tax levied in 1950 was \$4,280.44, and in 1951 it was \$4,518.29.

"The formula for the assessment of the tax on flight equipment, defined in the statute as aircraft fully equipped for flight and used within the continental limits of the United States, is set forth in section 77-1245, R. R. S. 1943, as follows: 'Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of non-scheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period.' It is the contention of the plaintiff that the taxing of its flight equipment is prohibited by the Commerce Clause in any amount whatsoever. The question to be determined, therefore, is whether or not the levy of any ad valorem personal property tax on the flight equipment of the defendant on an allocation basis contravenes the Commerce Clause of the Constitution of the United States."

3. Next follows in the opinion an analysis of the cases cited by plaintiff and defendants below and comments by the court below. The law expressed in the opin-

ion will be the basis of the *Specification of Errors* and the *Legal Points* in this brief following this *Statement of the Case*.

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EPITOMIZATION OF THE STIPULATION OF FACTS

1. It will be noted from the Stipulation of Facts (App. C and R. 10) that the schedule of flights of the various aircraft in question are detailed fully. Two flights southbound through Omaha daily stop, one for five minutes and one for twenty minutes, at the airport in Lincoln. Two northbound flights through Nebraska stop at Lincoln and then in Omaha, and these are on the ground at the airport in Lincoln twenty minutes each. The termini of all these flights and all others are from points outside Nebraska. The stops in Lincoln are the result of a trial period granted by the Civil Aeronautics Authority on July 15, 1951. The flights between Omaha and Lincoln and between Lincoln and Omaha do occasionally take on persons and property between those two close points within the State. The statistics in the Stipulation of Facts show that such traffic was negligible during the test period from July 15, 1951, to January 1, 1952. Statistics thereon in the stipulation show that the percentage of passenger revenue originating and terminating in Nebraska (that is, between Lincoln and Omaha and between Omaha and Lincoln) to the total system income amounted to .051% (App. C, par. 5, 6, 7, 8). The mail tons were .571%, express .390%, freight .250% and the number of passengers .271% of the total.

[Appellant submits that the rule of de minimus might well be considered here. However, no question is raised concerning the State's right to tax local property or impose other legitimate tax on localized intrastate business, if it can be separated readily from the interstate business.]

By direct quotations from the facts it is proven that:

"2. Plaintiff's principal activities in Nebraska consist of descending from the air above the state to unload persons and property from other states and promptly load persons and property in the same aircraft at the Omaha airport and ascend into the air and continue the scheduled flight through the air to the scheduled destination in other states. There are fourteen of such flights in and out of Omaha each day. Plaintiff's aircraft move in a continuous circuit, so to speak, with planes moving in and out of the circuit from the over-all base in Minnesota, there being constantly in use in the circuit all of plaintiff's aircraft which are not at the over-all base; notwithstanding the fact that a particular plane may, during the course of its flight in the circuit, be given one or more flight numbers and thus a given flight be spoken of as originating and terminating at specific cities."

3. The Stipulation of Facts show that Mid-Continent Airlines, Inc., and Braniff Airways, Incorporated, the appellant, were consolidated effective August 1, 1952, with a stipulation in the record that the appellant in this case shall be Braniff Airways, Incorporated (R. 46-7).

4. The consolidated air miles, unduplicated, were stipulated for the entire system to be 7,336 air miles, serving sixty communities in the United States, plus Latin American and Mexican routes. Fourteen of these flights alight in Omaha, Nebraska, and of them four also alight in Lincoln and all are engaged in interstate flights.

5. The Stipulation shows that the distance from Lincoln, Nebraska, to Rulo, Nebraska, the State border, is ninety miles; that it takes forty-two minutes to fly that distance; that there are four such flights each day, being those coming from outside the State to and from Lincoln, Nebraska.

6. The State of incorporation of Mid-Continent was Delaware, and of Braniff is Oklahoma. The executive offices of Braniff are at Dallas, Texas. The home port, so to speak, of the appellant where it maintains repair shops, machinery, equipment, and hangars is the Wold-Chamberlain Air Field at St. Paul, Minnesota. The Stipulation states that after fifty hours of flight each aircraft of appellant must return to Minneapolis and St. Paul under the Civil Aeronautics Code regulations, where it must be governmentally inspected, overhauled, and relicensed (App. C, par. 10).

7. Paragraph 11 (App. C) states that the fourteen aircraft designated are flown through the air within the limits of specifically described and assigned aerial highways under the jurisdiction of the Civil Aeronautics Board; that all parts of the airplane and the personnel, including all pilots, are under government license; that all aircraft and equipment must appear at designated times at the St. Paul base for inspection and relicensing by the United States Government. Consequently, the aircraft and its equipment are there for purposes other than interstate flight.

8. In paragraph 12 (App. C) it is agreed that at the Omaha Municipal Airport the Federal Government has constructed a control tower where the Government

employs a chief airport control officer with eleven assistants, at a governmental expense of \$50,000 a year. These men are so stationed for the purpose of controlling and directing aircraft coming into and departing from the Omaha airport, and are in communication with all the aircraft pilots in question at all times coming to or going from Nebraska. Each aircraft pilot receives instructions when ten minutes out (not miles), of where, when, and how to alight and at which airport and which runway at the airport to use.

9. The government controllers are in constant communication with other major airport control towers spaced throughout the United States directing flight in the air lanes through which appellant's planes are licensed and restricted in flying throughout the nation, including those used by appellant over Nebraska. These air lanes are approximately ten miles wide and are established north, south, east, and west. Each air carrier has been granted certain priorities in the use thereof. Radio facilities are provided by the Government along these air lanes to direct all air traffic from one point to another. If planes are not equipped with radio phones to talk back and forth with the control tower, the Government safeguards all flights with a radio beam attuned to the aircraft. These and other facilities are owned and financed by the United States to protect and aid all persons engaged in flight.

10. All violations of the rules and regulations of flight, operation, management, and supervision by men or women on the aircraft and the air carrier officials are subject to fines and penalties, civil and criminal, under the Civil Aeronautics Act (App. C, par. 13).

11. At the close of 1951 Mid-Continent, the predecessor of appellant before 1952, had a total operating revenue from all sources of \$9,818,363 with an operating expense of \$9,508,859 and a profit after taxes of \$135,941. The gross income was \$7,681,760.80 from passengers; \$1,608,590.65 from mail; \$331,261.23 from freight, express, and excess baggage; \$171,037.96 from other sources, and \$25,712.68 from miscellaneous items. These amounts total \$9,818,363.32.

12. Mid-Continent was capitalized at 418,755 shares at the par value of one dollar. It had debentures due May 1, 1954, of \$50,000; May 1, 1959, \$100,000; May 1, 1962, \$150,000; and May 1, 1963, \$1,000,000 (App. C, pars. 15, 16, 17).

13. In order to prove that the appellant is "paying its way" in the State of Nebraska, the facts were stipulated that the landing fees and depot rental space at the municipal airport in Omaha was approximately \$22,000 for 1951. This was and is by contract with the City of Omaha, and charges for airport use are based on the number of landings and the certified weight of the aircraft here in question as the incident of the tax. The charges are applicable to all air carriers using the Omaha Municipal Airport. The income from the charges are deposited with the Treasurer of the City of Omaha and expended for the Omaha Municipal Airport improvement and maintenance.

14. In 1951, 567,000 gallons of gasoline were taken on by the appellant for refueling purposes at the Omaha Municipal Airport upon which a gallonage tax of \$14,180 was paid. The disposition of this gasoline tax was not

the subject matter of the Stipulation. However, a Nebraska State statute requires that the tax so obtained from gasoline bought for and used in aircraft be deposited in a separate fund by the Treasurer of the State of Nebraska and used under the supervision of the State Commission to aid in building and supervising the construction and the maintenance of airports throughout the State of Nebraska, including the airports in Omaha and in Lincoln (App. C, pars. 18, 19) (R. R. S. Nebraska 1943, Sec. 3-148).

15. The personal property of the appellant, such as office furniture, equipment, auto trucks, and all similar property located at Omaha or Lincoln is taxed in the respective counties. The Douglas County (Omaha) property tax was stipulated to be between \$200 and \$300 annually.

16. The Stipulation further stated that comparable amounts were paid in other municipalities in other states where the aircraft land and take off (App. C, par. 20).

17. Tax forms were filed by Mid-Continent Airlines for 1950 on blanks furnished by the defendant-appellee Tax Commissioner, and for 1950 the mill levy was the same as the mill levy for general revenue throughout Nebraska. Under the formula in the act (App. B) the State Tax Commissioner assessed appellant taxes in the amount of \$4,280.44 for 1950. The valuation figure for the flight equipment for Nebraska for that year under the proportional theory was fixed at \$118,901. That tax was and is unpaid. Similar assessments have been made in increasing amounts each year since and are continuing to be assessed. For 1951 the mill levy was 38, and the tax

was assessed at \$4,518.29. These taxes were on the proportionate value of appellant's aircraft that were flown to and from the airports in accordance with the statutory formulae and rights given the Tax Commission.

18. The manner of arriving at the tax under the statute is set forth in paragraph 22 of the Stipulation (App. C). The tax blank form is divided into three parts. In the first part is a system value formula set up which takes in a five-year average of operating income capitalized at 6%; next a five-year average of the market value of the stocks and bonds is required on the return form; next a book value depreciated cost basis is set up by the Commissioner from the returns required. These are added, and then divided by three, which gives a total to system value of \$3,373,283. Under another part of the formula the statute provides the defendants-appellees shall set up on the return, flight equipment apportionment to the total assets, obtained by the ratio of all flight equipment cost to the total operating property cost. This resulted in flight equipment cost to the total cost of the property at 61.1% without depreciation. With depreciation it was 33.5% of the total. So that the average of the undepreciated and the depreciated aircraft to all property cost was 47.3%. This was obtained by adding 61.1% to 33.5% and dividing by two.

19. Under the third section of the formula set forth in the statute, the total of arrivals and departures in Nebraska for the previous year was 10,306. The total arrivals and departures over the system for the previous year were 114,104. The consequent percentage of 9.032 for Nebraska resulted. The ratio of revenue tons handled in Nebraska to the total revenue tons handled over the

system gave a percentage of 11.541%. The ratio of revenue dollars and cents originating in Nebraska compared to the total system revenue resulted in a percentage of 9.235%. The average for the three ratios resulted in 9.936%.

20. By multiplying \$3,373,283 system value by 47.3%, the aircraft value of \$1,595,563 was attained. This amount multiplied by 9.936% (which is the allocation formula found by following the statute as above stated) resulted in \$158,535 for the ad valorem value of the flight equipment alighting in and ascending from Nebraska. A general reduction of all values throughout Nebraska by 75% was allowed—\$158,535 was reduced to \$118,901. Multiplied by the general State mill levy of 36 (1950) and 38 (1951), respectively, gave the alleged right to assess \$4,280.44 for 1950 and \$4,518.29 for 1951 against the aircraft in question.

It is these taxes, with the continuing assessments that appellant seeks to nullify by declaring the statute (App. B) constitutionally void by the decision of this Court.

21. Paragraph 24 of the Stipulation is based on the statute in question (77-1244(1) (1246) (App. C):

“The tax in question is assessed only against regularly scheduled air carriers upon their flight equipment, which is the fully equipped airplane, operating from without of the State of Nebraska and into and out of Nebraska, and is not applied to carriers who operate only intermittently in the State of Nebraska in flights from and back to a fixed base in Nebraska. Such planes are assessed by the local county assessor in the county in which the base is located.”

22. It will be noted that the statute refers to no mileage such as is frequently found in apportionment statutes allocating the total miles traveled within the State to the total miles over a system. No miles are traveled within Nebraska by aircraft. There is visitation only to carry on interstate commerce at the airport, where the "wharfage" is paid.

23. It was further stipulated (App. C, par. 26) that:

"The tax collected from air carriers flying in and out of Nebraska under the act is used for the general expenditures of the state. In making the levy based upon the valuations and ratios above set forth, no ratio is determined by the defendants in intrastate to interstate business carried on by the plaintiff in Nebraska."

24. It will be noted that all figures were furnished by the appellant to the appellee and its taxing officials, as shown by paragraphs 5 to 8, inclusive.

25. Further the Stipulation shows (App. C, par. 27),

"The rate of tax levy imposed upon plaintiff's flight equipment, pursuant to the legislative enactment here in question, is equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year."

26. From the Stipulation it seems clear that, irrespective of the name given to the tax by the State Legislature, it must be assessed, levied, and collected for general revenue purposes of the State of Nebraska rather than used as a special tax levied for maintenance, operation, upkeep, policing, patrolling, supervising, or licensing

the appellant in reference to the flight of its aircraft in and out of the airports of Nebraska.

27. From the Stipulation it likewise seems clear that the aircraft attain no taxable situs in Nebraska. They traverse no part of Nebraska. They come in from the airways above, which are now public domain under Federal supervision, to land and take off from municipally owned runways. The Stipulation proves that charges are made by the municipality for such landings and take-offs and depot privileges at an agreed rate. This aggregated \$22,000 for 1951.

SPECIFICATION OF ERRORS

On November 11, 1953, under Rule of this Court 13(9), appellant filed herein the Points Relied Upon for Reversal (R. 49). Previously appellant filed its Assignment of Errors with the Clerk of the court below (R. 36). Reference will be made to them, should this Specification of Errors be challenged as too limited for points submitted and argued. Appellant claims the following errors are apparent from the opinion of the court below (App. A and R. 35).

1. The court erred in upholding the statute by stating:

“* * * Interstate commerce may be required, of course, to pay its fair share of the property tax burden which the states, in which the interstate business is done, may lawfully impose generally on property located in them. * * *”

It appears from the facts stipulated that appellant's aircraft were, at no time, "located in" Nebraska.

2. The court erred in upholding the taxing statute in question by stating:

"* * * and the assessed value of the property bears a fair and reasonable relation to the use made of it in such taxing state."

It appears from the facts stipulated that there is no relationship between the amount of the tax paid and the use made of the property in the State. The finding of the court contemplates some cooperation, some mutual assistance, some mutual aid, and the furnishing of facilities for the tax money to be paid, none of which benefits or facilities or uses are present in the case at bar.

3. The court erred in applying the following words in the opinion to the tax in question as a basis for its finding of validity:

"* * * interstate commerce bears no undue part of the burden if the personal property tax imposed by a given state is exclusive of all other property taxes assessed by other states, or, what is more material to the case before us, if the tax on its personal property regularly used over fixed routes in interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state."

It appears from the stipulated facts that the appellant pays other taxes in the form of (a) privilege tax for the right to land at the Omaha Municipal Airport costing appellant \$22,000 a year (1951); (b) an ad valorem personal property tax upon all the personal property of the

appellant located in Douglas County, Nebraska, \$200 to \$300 a year; (c) a gasoline tax on the purchases made at the airports in Nebraska at tax cost of \$14,180 a year (1951) which tax income is used by the state to build and maintain airports in the state. There is no "use" tax for facilities except for alighting at the airport under the facts stipulated. There are no "fixed routes" to travel in this case in Nebraska upon which the state may claim a use thereof or a situs thereon.

4. The court erred in basing its opinion upon the portion of the statement above quoted, and in applying it to the facts in the case at bar, that the commerce in question "bears no undue part of the burden" of the tax in question because the formulae provide for proportional taxing. It appears from the evidence that the beginning ad valorem proportional tax in 1950 was \$4,280.44 and in 1951 was \$4,518.29. Part of the formula (App. B) to arrive at the tax was and continues to be based upon tonnage transported by air in the aircraft taxed, in proportion to the revenue tons transported by the appellant throughout the United States, and on proportioned revenue tons and revenue passengers in the same manner from interstate operations. The court erred in failing to conclude that the tax assessed violated the Tonnage Clause of the Federal Constitution (Art. I, Sec. 10, Cl. 3), which prohibits any state from laying a duty of tonnage except with the consent of Congress. On the contrary, Congress pre-empted the field of aviation and took unto itself all rights and privileges of regulation. (cf. Civil Aeronautic Code cited and epitomized above.)

5. The court erred in failing to recognize and apply the law that the Commerce Clauses of the Federal Con-

stitution (Art. I, Sec. 10, Cl. 3; Art. I, Sec. 9, C. 6 as well as Art. I, Sec. 8, Cl. 3). The vesting of exclusive jurisdiction in Congress to regulate the instrumentalities moving in interstate aerial commerce. The grant in Section 8, Cl. 3, appellant contends may not be delegated by the Congress to the states though the others might be delegated by consent of Congress. Any right to tax by a state must be for "wharfage" or airport privileges, uses of local warehouses, depots, and other facilities for which charges or taxes may be collected. None of such uses, protections, or privileges furnished by the State are involved in the ad valorem tax in question. The facts and the purpose of the tax are shown throughout the Stipulation (App. C, pars. 24, 25, 26, 27 and R. 20 and 23) to be solely for general revenue purposes, unrelated to the aircraft or the carrier in its admittedly interstate commerce activities.

6. The court erred in stating:

" * * * We find that the act is not violative of Article I, section 8, Clause 3; Article I, section 9, clause 6; or Article I, section 10, clause 3, of the Constitution of the United States, on the basis on which it is here challenged."

It appears from the face of the statute in question (App. B) and the Stipulation of Facts (App. C) that the Commerce and Tonnage Clauses are definitely violated by the creation and assessment of the ad valorem tax. The tax, if unlawful, is a burden upon the industry of the appellant while pursuing interstate commerce in and out of the airports of Nebraska under the facts above stipulated.

7. The court erred in stating that the *Northwest Airlines* case, decided in 1944 (322, U. S. 292, 64 S. Ct.

950, 88 L. Ed. 1283, 153 A.L.R. 245), forms the basis for holding the ad valorem tax at bar valid. It appears that Minnesota was the State of domicile and home port of the appellant. The court said:

“ * * * The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted * * *.”

The Court upheld the Minnesota ad valorem tax on aircraft fundamentally on the facts quoted. It appears that none of such basis for the tax nor the benefits afforded from such basis are present in the case at bar.

8. The court erred in basing its decision in the case at bar on the same constitutional footing as taxation of inland barges, Pullman cars, trucks, buses, and rolling stock. It appeared that, in each instance in the cases cited in support of the opinion below, the court erred in failing to recognize that the incident of the tax or instrumentality to be taxed, by its presence within the taxing state had first attained a well-recognized taxable situs therein which alone formed the foundation for the personal property tax in each case cited. In the case at bar the aircraft, at no time during the year, attained a taxable situs within the State of Nebraska that would permit the State legally to evaluate, assess, and levy the ad valorem taxes in question. The court erred in assuming that the proportional tax in Nebraska legalized the tax in question even though there existed in Nebraska no taxable proportion of the fleet as the basis for a percentage value of an entire fleet of aircraft operating nationwide.

9. The court erred in failing to apply the established legal concept of the status for tax purposes of an ocean-going vessel coming into the port of a state while engaged in international or interstate commerce. The aircraft in question coming into the state from the air above the United States for the sole purpose of interstate commerce missions and returning in the same manner at the conclusion of its interstate mission should be adjudged the same as a seagoing vessel.

10. The court further erred in deciding that, because the domiciliary state did not or could not legally tax the aircraft, the Commerce Clause became inoperative as a protection to interstate commercial air flight throughout the rest of the United States. Only where a real tax situs has been attained in any state does the basis for taxation exist.

11. The court erred in failing to differentiate, in each of the cases cited in the opinion (App. A), the legal consequences of the issue here before the Court, i. e., Congress has established the public right of transit in the air above the United States by enacting into law the following:

“There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States.” June 23, 1938, c. 601, Title 49, United States Code Annotated 403.

12. The court erred in its opinion by failing to recognize that the Civil Aeronautics Code, in force and effect at all times mentioned herein (June 23, 1938),

pre-empted the field of aviation to the extent of prohibiting any state from hampering or burdening the carrying out of the express purposes of the Code by levying an ad valorem tax upon aircraft, fully equipped for and engaged in flight in interstate commerce (App. B). Such instrumentality is the only means by which air commerce among the states can be effected.

13. Furthermore, the court erred in upholding the tax upon that instrumentality when it alighted at the airport designated and controlled by the Civil Aeronautics Board as the only place in which interstate aerial commerce to and from Nebraska could be effected.

14. The result of the court's errors below obviously burdens interstate aerial commerce in Nebraska.

LAW POINTS TO ESTABLISH ERRORS AS SPECIFIED

Point I.

The Commerce Clauses of the Federal Constitution (Art. I, Sec. 8, Cl. 3; Art. I, Sec. 9, Cl. 6; Art. I, Sec. 10, Cl. 3) vested in the National Congress the exclusive right to regulate commerce among the states. To levy a personal property tax by state or nation on any instrumentality while pursuing commerce among the states constitutes regulation as stated in the Constitution.

Best & Co. v. City of Omaha (1948), 149 Neb. 868, 33 N. W. 2d 150.

Gibbons v. Ogden (N. Y., 1824), 9 Wheat. 1, 6 L. Ed. 25.

Smith v. Turner (N. Y., 1848), 7 Howard 283.

"Constitutional History of the United States," by Andrew C. McLaughlin (Professor Emeritus of History, University of Chicago, 1935), pp. 398-9.

"The Constitutional History of the United States, 1776 to 1826," by Homer Carey Hacket (Professor of History, Ohio State University, 1939), pp. 371-380.

"A Declaration of Legal Faith," by Wiley Rutledge (late an Associate Justice of the Supreme Court of the United States; 1947, University of Kansas Press), pp. 72-3.

"Lectures on the Constitution of the United States," by Samuel Freeman Miller, LL.D. (late an Associate Justice of the Supreme Court of the United States; 1891), pp. 433-4, 443-9.

"The Commerce Clause Under Marshall, Taney and Waite," by Felix Frankfurter (Associate Justice of Supreme Court of the United States; 1937, University of North Carolina Press) pp. 112-14.

"The Court and the Constitution," by Owen J. Roberts (Retired Associate Justice of the Supreme Court of the United States; 1951, Harvard University Press), pp. 37-9.

Point II.

A state may levy a tax, by whatever name called, on instrumentalities being used in interstate commerce if the funds derived are in exchange for state benefits conferred; as pay for the use of facilities of the state; for protection; for reciprocal rights from the state; or for the maintenance of property used in furtherance of interstate commerce.

Bode v. Barrett (Ill., 1953), 344 U. S. 583, 73 S. Ct. 468.

Capitol Greyhound Lines v. Brice (Md., 1950), 339 U. S. 542, 70 S. Ct. 806.

City of Chicago v. Willett Co. (1953), 344 U. S. 574, 73 S. Ct. 460.

Dohrn Transfer Co. v. Hoegh (Iowa, 1953), 116 F. Supp. 177 (Before Thomas, Circuit Judge, Graven and Riley, District Judges).

Lloyd A. Fry Roofing Co. v. Wood (Ark., 1952),
344 U. S. 157, 73 S. Ct. 204.

Memphis Steam Laundry Cleaner, Inc. v. Stone
(Miss., 1952), 342 U. S. 389, 72 S. Ct. 424.

Spector Motor Service, Inc. v. O'Connor (1951),
340 U. S. 602, 71 S. Ct. 508.

Point III

(1) The National Congress may assume jurisdiction, control by licenses and penalties, regulate, and supervise the instrumentality of interstate commerce and such intrastate commerce as may affect the national administration of that commerce.

(2) When Congress does so legislate in the field of aerial navigation, interstate air commerce is pre-empted. A general revenue-producing property tax assessed by a state against aircraft on missions of interstate commercial flight while so engaged illegally burdens commerce and the administration of the Civil Aeronautics Code.

Blalock v. Brown (1949), 78 Ga. App. 537, 51
S. E. 2d 610, 9 A. L. R. 2d 476.

Chicago & Southern Air Lines, Inc. v. Waterman
S. S. Corp. (1948), 333 U. S. 103, 68 S. Ct. 431.

Lichten v. Eastern Air Lines (N. Y., 1951), 189 F.
2d 939.

Public Utilities Comm. of California v. United
Air Lines, Inc. (1953), _____ U. S. _____, 74 S. Ct.
151, 98 L. Ed. p. 99.

Rosenhan v. U. S. (C. A. 10, Utah, 1942), 131 F. 2d 932, (cert. denied 318 U. S. 79, 63 S. Ct. 993).

U. S. v. Causby (1946), 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206.

U. S. v. Drumm (Nev., 1944), 55 F. Supp. 151.

U. S. v. Perko (Minn., 1952), 108 F. Supp. 315.

Title 49 U. S. C., Secs. 401-705, Chapter 9. (This Civil Aeronautics Code has been summarized at pages 7-10 hereof.)

U. S. Code Congressional Service, Vol. 2, 1950, p. 3945. House Report No. 2709; Text of Act, Vol. 1, 1950, p. 1063; Vol. 1, p. 1084; Vol. 2, p. 3998, House Report p. 3038.

Point IV.

The decisional law denying the state of creation of a corporation the right to levy a property tax on the value of instrumentalities of that corporation used in interstate commerce, that are continuously during the tax year beyond the borders of the domiciliary state, forms no right for another state to so tax proportionately or otherwise those instrumentalities when the basic facts for a taxable situs of the instrumentality is lacking in the state of visitation.

Johnson Oil Refining Co. v. Oklahoma (1933), 290 U. S. 158, 54 S. Ct. 152.

McCulloch v. Maryland (1819), 4 Wheat. 316.

Nashville C&St. L. R. Co. v. Browning (1940), 310 U. S. 362, 60 S. Ct. 968, 84 L. Ed. 1254.

New York Central & H. R. Co. v. Miller (1906), 202 U. S. 584, 26 S. Ct. 714, 50 L. Ed. 1155.

Northwest Air Lines, Inc. v. Minnesota (1944),
322 U. S. 292, 64 S. Ct. 950, 88 L. Ed. 956,
153 A. L. R. 245.

Ott v. Mississippi (1949), 336 U. S. 169, 69 S. Ct.
432.

*Pullman's Palace-Car Co. v. Commonwealth of
Pa.* (1891), 141 U. S. 18, 11 S. Ct. 876.

District of Columbia v. Smoot Sand & Gravel Co.
(1950), 184 F. 2d 987.

Standard Oil Co. v. Peck (1952), 342 U. S. 382,
72 S. Ct. 309.

Point V.

(1) The Commerce Clause protects owners against a state personal property tax on vessels coming from the high seas into a port within a state in furtherance of international and coastwise interstate commerce among the states.

(2) An aircraft arriving at an airport in a state from the navigable air space of the United States, alighting and ascending solely in pursuit of its interstate commerce mission, should be legally adjudged for tax purposes as if a vessel from the high seas.

(3) That such aircraft and vessels so engaged arrive and depart on regular schedules forms no legal basis to change the established law of the constitutional protection.

*John C. Hays v. The Pacific Mail Steamship
Co.* (Calif., 1854), 17 How. 596, 15 L. Ed. 254.

Morgan v. Parham (1872), 16 Wall. 471, 21 L.
Ed. 302.

SUMMARY OF ARGUMENT

The Court will find from the stipulated facts that the tax in question is an ad valorem tax on aircraft that are engaged in interstate commerce and is assessed on those aircraft when they alight in Nebraska while so engaged and consequently is void (Law Points I and V, Specification of Errors 6 and 13, 7, 9, and 10).

The tax is void because it is for neither a use, a privilege, nor for protection. Nor is it a direct benefit tax. Nor is it readily traceable as a benefit. It fails to justify for facilities or privileges which the appellant has not otherwise paid for alighting in Nebraska. The tax is invalid because the appellant pays for its landings upon the airport while engaged in interstate aerial commerce in Nebraska. Such payments are substantial and are made in accordance with an agreement with the airport authorities in Nebraska.

The appellant pays its gallonage tax on large amounts of gasoline bought for and used in its aircraft at the Omaha Municipal Airport. Such gasoline tax is used by the State of Nebraska in connection with the upkeep of airports within the State (R. R. S., Nebraska 1943, Sec. 3-148). (Law Point II, Specification of Errors 2 and 3).

From the stipulated facts it appears that Congress has pre-empted the field of aviation and has dedicated the air space of the United States, free to the citizens who engage in air commerce. Congress has otherwise pre-empted the field of aviation as to both regulation and supervision. Regulation includes the power to tax. This right remains solely in Congress under the Commerce Clause (Law Point III, Specification of Errors 4, 5, 11, 12).

The aircraft flown in and out of Nebraska attain no taxable situs within the State. The fact that the aircraft go in and out on regular schedules in furtherance of interstate commerce is the practical means of carrying on that commerce and aggregates no taxable permanency. Such visitation differs from the instrumentalities of commerce that abide and remain within the State in large numbers at all times or for great lengths of time, resulting in an attained taxable situs. The consequent proportional taxing of such property engaged in land and inland water transportation abiding within the State has no parallelism with the air commerce in question (Law Point IV, Specification of Errors 1 and 8).

The Nebraska ad valorem taxing statute directed at the aircraft engaged in interstate commerce of the appellant is void because repugnant to the Commerce Clause of the Federal Constitution (The Nebraska Statute, Ch. 77, R. R. S. Nebraska 1943, Sections 1244-1250, App. B this brief).

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ARGUMENT

Argument to Sustain Law Point I and Establish Specification of Errors 6 and 13.

The Commerce Clause, Section 8 (3), provides no exception that Congress only shall have the right to regulate commerce among the states, while the clauses in Sections 9 and 10, vest in Congress the power to give rights to the states only in matters stated in those sections.

All argument, therefore, of the powers of a state to tax the means or instrumentalities engaged in interstate

commerce are valueless unless the state tax falls within permissive exceptions upheld by decisional law of this Court.

The subject matter of this case is an aircraft, fully equipped for and carrying on commerce among the states. Thus an exception to the Commerce Clause must be made if the ad valorem tax of the State of Nebraska on such aircraft is to be upheld.

In the *Northwest Airlines* case the Minnesota tax on the aircraft was upheld because the airline received benefits and protection in exchange for the tax by the domiciliary state. Also within that state the total fleet of aircraft was required to return and did return to the state for purposes other than interstate commerce. The case involved primarily due process of law. The *Northwest Airlines* case will be discussed fully under Law Point IV establishing Specification of Errors 1 and 8.

The Supreme Court of Nebraska understands the application of the Commerce Clause. It stated it in the *Best & Co.* case, which involved the right of the City of Omaha to levy a tax designated as a license on a corporation seeking to carry on business within the state, which involved interstate commerce, without paying for the right or privilege required by city ordinance. The definition should have been applied to the appellant airline corporation in its interstate business in the State of Nebraska. The Court's failure to do so resulted in the Specification of Errors 6 and 13. The Nebraska court properly held in the *Best* case as follows:

“ * * * The court held that the power granted to Congress to regulate commerce among the states being

exclusive when the subjects are national in their character, and admitting only of one uniform system of regulation, the failure of Congress to exercise that power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. In the opinion the court said: 'In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.'

"The court further held that interstate commerce cannot be taxed at all by a state even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the state.

* * * * *

"We conclude that the ordinances in question directly and unlawfully regulate and burden interstate commerce in violation of Article I, Section 8 of the Constitution of the United States."

There should have been no difference in reason or in principle for applying the Commerce Clause differently in the case at bar by the same Court.

The *Gibbons v. Ogden* reasoning and conclusions may be changed only by amendment to the Constitution of the United States. The opinion has stood since 1824. It applies as soundly to the aircraft today as it did to the vessels then. In fact, Chief Justice Marshall said in the opinion that a state had no more right to tax or regulate the vessels "than if they were wafted on their voyage by the wind." 9 Wheat. 1, 6 S. Ct. (Curtis) 23. The sole

power of Congress to regulate "commerce among the states cannot stop at the external boundary line of each state but may be introduced into the interior." He also stated:

"These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they did not purport to restrain."

Furthermore, and directly applicable to aircraft, Chief Justice Marshall said:

"But it is almost laboring to prove a self-evident proposition, since the sense of mankind, the practice of the world, the contemporaneous assumption, and continued exercise of the power, and universal acquiescence, have so clearly established the right of congress over navigation, and the transportation of both men and their goods, as not only incidental to, but actually of the essence of, the power to regulate commerce. * * *"

The evidence in the Stipulation of Facts and in the findings in the opinion below fail in the effort to remove the aircraft in question from the category of the navigation defined by Marshall.

Smith v. Turner, known as the passenger cases, occupying 176 pages of opinions, explains the elementary function of all the Commerce Clauses. If the Nebraska tax is upheld, then each state may impose taxes as irregularly and as differently as there are states in which the aircraft alight in pursuit of interstate commerce. One of the basic reasons for the constitutional provisions is illustrated in *Smith v. Turner*:

"* * * The tax must be uniform throughout the union; consequently, the exercise of the power by any

one State would be unconstitutional as it would destroy the uniformity of the tax. To secure this uniformity was one of the motives which led to the adoption of the constitution. The want of it produced collisions in the commercial regulations of the States. But if, as is contended, these provisions of the constitution operate only on the federal government, and the States are free to regulate commerce by taxing its operations in all cases where they are not expressly prohibited, the constitution has failed to accomplish the great object of those who adopt it.

“These provisions impose restrictions on the exercise of the commercial power, which was exclusively vested in congress; and it is as binding on the States as any other exclusive power with which it is classed in the constitution.”

When the Nebraska court said that it found the act not violative of the Commerce Clauses “on the basis on which it is here challenged,” reversible error was committed. The court below erred when it gave no heed whatever that Congress had pre-empted the field of aerial commerce and that the tax in question casts a burden on the instrumentality as well as to hamper and burden the execution of the Civil Aeronautics Code. Basically, the Nebraska tax is void as repugnant to the Commerce Clause of the Federal Constitution.

Professor Homer Carey Hacket in his cited history in 1939 states on page 372:

“The reasoning of counsel in *Gibbons v. Ogden* was epochal in character, due in part to the novelty of the questions discussed but also in large measure to the fact that several of the ablest lawyers in the country were engaged in the case.”

The author further commented upon Webster’s argument in the following language:

“Webster’s argument, without quite rejecting outright the concept of concurrent power, tended distinctly towards the conclusion that the power to regulate commerce was by nature indivisible. ‘All useful regulation does not consist in restraint; and that which Congress sees fit to leave free, is a part of its regulation, as much as the rest.’ He evidently believed that the admission of the states’ power to deal with a commercial matter on the ground that Congress had not yet done so would defeat the purpose of the constitutional provision, which he held was to empower Congress gradually, as need arose, to develop a system. State legislation, by regulating that which Congress intentionally left unregulated, would clash with the congressional plan. It was consequently incompatible with the congressional power of regulation.

* * * * *

“Marshall, in giving the opinion of the court, first defined the word commerce broadly, as including navigation. * * * This principle is, if possible, still more clear when applied to commerce ‘among the several states. * * * The power of Congress * * * comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with ‘commerce with foreign nations, or among the several States, or with the Indian tribes.’ * * *”

The late Honorable Wiley Rutledge in 1947 wrote in his cited “A Declaration of Legal Faith” at pages 72-3:

“The commerce clause has been by no means perfect in its application and administration. Some large blunders there have been; others no doubt will be. But on the whole the clause has accomplished its great objective. From the disunited states of 1786, which interstate trade barriers had created, has grown the United States of 1946. No small part of that growth

has been due to the effects of the commerce clause and its administration. Perhaps no other constitutional provision has played a greater part.

“That part must continue if the nation would remain great and democratic. A balkanized America today would be vulnerable to attack from without and would be unequal to maintaining our people within. Our dream comprehends something more than a subsistence level of living. For tomorrow as for yesterday, it can be realized only by giving the commerce clause its originally intended application.”

Honorable Samuel Freeman Miller, LL.D., formerly Justice of the Supreme Court of the United States, in 1891 said at page 433 in his cited lectures:

“The text of this discourse is one of the most important of the powers delegated to Congress by the Constitution of the United States.”

Then he set forth Article I, Section 8, Clause 3 at pages 434 and 443-5 and logically analyzes it as follows:

“You would scarcely imagine, and I am sure you do not know, unless you have given some consideration to the subject, how very important is that little sentence in the Constitution. It was the want of any power to regulate commerce, as between the States themselves, and with foreign nations, which as much, and I am not sure but I am justified in saying more, than any one thing, forced the States to form the present Constitution in lieu of the Articles of Confederation under which they had won their freedom and established their independence. * * *

“From that time until the present the efforts of the individual States to take advantage of their opportunities to impose duties, taxes, restraints, and burdens upon the property of citizens of other States passing through or brought into them have been the source of the continued exercise of the jurisdiction

of the Supreme Court of the United States, where such laws have in almost every instance been declared void. For example, the statute in the case of *Guy v. Baltimore*, 100 U. S. 434, was an old sinner, and made a very clever attempt to conceal the evil. It appeared that the city of Baltimore owned some wharves in that city at which vessels coming to that port landed: probably not all, but some of them, and imposed a certain tax for the use of those wharves. This was begun a great many years ago, and was done by an act of the General Assembly of Maryland, passed in 1827, and regulations made thereunder by the city authorities, which provided in effect that all articles of merchandise brought into that city and landed at its wharves, which were the produce of the State of Maryland, should pay no fees on account of their use, but that all similar articles brought into that port from any other State should pay a tax for the use of the wharf upon which it was landed. Of course it was a small affair, the main business of these wharves being the landing of chickens, eggs, potatoes, cabbages, oysters, and other articles of food and things of that kind, so that the sum that any one little sailing vessel had to pay did not amount to much. Nobody, therefore, resisted its payment until a few years ago, when a man was at last found who would stand it no longer. In 1876 *Guy*, a resident citizen of Accomac County in the State of Virginia, landed his vessel at one of the public wharves, and when this tax was demanded of him refused to pay it. * * * It was invalid as a regulation of commerce. It was not merely intended to raise money for the use of a wharf,—that they had a right to do, and if they had laid a reasonable tax for its use and laid it alike upon the produce which came from every State in the Union, it would have been a valid tax; but it was evident that it was intended by this statute to make the produce and goods of Virginia, which lies right alongside, as well as that of the adjacent States of New Jersey and Delaware, which came into

this port for a market, pay a tax to keep up the wharves and wharfage system of that port, while permitting the entry of goods and produce from the State of Maryland free of any such imposition. This was held to be a regulation of commerce, and though of nearly sixty years' standing, to be void."

From this learned Judge's writings we can visualize today, with the start that Nebraska has made in the taxation of aircraft, unless stopped, other states will follow. States will vie with each other. States of creation and home port states may exempt aircraft entirely from taxation. The rate of levy and valuation placed upon the same aircraft will lead to the confusion that James Madison and the others sought to stop when the Commerce Clause was submitted to the people and ratified.

The Commerce Clause has peculiar application to aviation. It may be now as has been likened and compared with the vessels coming in from the high seas. That similarity is discussed and argued under Law Point V and Specification of Errors 7, 9, and 10.

The Honorable Felix Frankfurter in 1937, in his cited work, "The Commerce Clause Under Marshall, Taney and Waite," approved the following statement made forty years previously by the Honorable James Bradley Thayer:

" * * * As it survives fierce controversies from age to age, it is forever silently bearing witness to the wisdom that went into its composition, by showing itself suited to the purposes of a great people under circumstances that no one of its makers could have foreseen. Men have found, as they were finding now, when new and unlooked-for situations have presented themselves, that they were left with liberty to handle them. Of this quality in the Consti-

tution people sometimes foolishly talk as if it meant that the great barriers of this instrument have been set at naught, and may be set at naught, in great exigencies; as if it were always ready to give way under pressure; and as if statesmen were always standing ready to violate it when important enough occasion arose. What generally happens, however, on these occasions, is that the littleness and the looseness of men's interpretation of the Constitution are revealed, and that this great instrument shows itself wiser and more far-looking than men had thought. It is forever dwarfing its commentators, both statesmen and judges, by disclosing its own greatness. In the entire list of the judges of our highest court, past and present, in the business of interpreting the Constitution, few indeed are the men who have not, now and again, signally failed to appreciate the large scope of this great charter of our national life. Petty judicial interpretations have always been, are now, and always will be, a very serious danger to the country.' "

The majority and concurring opinions in *Northwest Airlines* clearly suggest the reasons for this Court to give full effect to the Commerce Clause to nullify the Nebraska statute.

The cases that might seem on the surface to open the way for the destruction of the Commerce Clause as a protection to aviation are explained and argued under Law Point IV which establishes the errors specified in paragraphs 1 and 8 pertaining to land and inland water commerce.

The Honorable Owen J. Roberts, in his cited work, "The Court and the Constitution," in 1951, stated:

"The exercise of the power of Congress to regulate can neither be enlarged nor circumscribed by

state action. Congress has the choice whether to prescribe that which supports state policy or that which runs counter to it."

These learned pronouncements on the constitutional provision prove one outstanding thing: Congress and Congress alone has the right to impose a tax upon aircraft engaged in interstate commerce. Congress might base such tax for the use of the aerial navigation facilities provided by the government. This will be fully explained and argued under Law Point III wherein error is established in the Specification of Errors 4, 5, 11, and 12.

Justice Roberts in the cited work concludes:

"Thus, though Congress has not legislated on the subject, it has been held that a state may not tax the transaction of interstate business and may not impose burdensome regulations on that business. Nor can the state interfere with or obstruct interstate travel."

There appears to be lacking a sound theory upon which the State of Nebraska imposed its ad valorem tax upon the aircraft as instrumentalities of interstate commerce. From the foregoing pronouncements of great authorities, we may conclude they would pronounce the Nebraska statute repugnant to the Commerce Clause of the Federal Constitution, under the admitted facts.

Argument to Sustain Law Point II and Establish Specification of Errors 2 and 3.

Seven cases have been selected for Law Point II to demonstrate state's rights to tax instrumentalities or the owners thereof engaged in interstate commerce. All these cases have been decided within the past four years. These

cases and many companion cases are the authority that the Commerce Clause fails as a defense to state taxation that is based upon the use of state facilities. The cases hold that there must be a close relationship between the tax and its benefits; there must be a readily distinguishable benefit conferred by the state; there must be certainty that the money derived from the tax will find its way, through no circuitous route, to reach the benefit bestowed upon the taxpayer.

The "use" question arises mostly, but not entirely, from the fact that the old roads, fraught with mud and ruts, were made by the states into well-paved and well-policed and protected highways. Obviously, by the invitation of the state, benefits were derived from the interstate use by trucks, buses, and automobiles on the new highways. However, the "use" tax has been definitely held invalid in cases where the relationship to benefits was lacking. In *Capitol Greyhound* the court reviewed, beginning in 1915, fifteen cases up to 1947. Of those, ten were held valid and four invalid. Those that were held invalid contained this notation: "Invalid as not being for the privilege of road use," or "Invalid as excessive in amount in relation to such expenses" (Morf), or "Invalid because the formula bore no reasonable relation to road use" (Dixie).

In the *Bode* case (1953) the emphasis in the argument was on the Commerce Clause. The state tax on such motor vehicle, to be valid, must be measured by or have some fair relationship to the use of the highway for which the charge is made. The majority opinion recited that the Commerce Clause as a defense against validity

was baseless, even though the factual evidence tendered by the appellant road users was not analyzed. Some of the interstate carriers in the case did an intrastate business as well; and as the tax was required for all vehicles that moved on the highways, it was adjudged to be a tax for the privilege of using the highways of Illinois. Furthermore, no showing was made by any of the appellants that the tax bore reasonable relation to the use made of the highway in the interstate carrier's intrastate operations.

In the case at bar the Stipulation of Facts is available to show the full story concerning what actually does transpire between Omaha and Lincoln and between Lincoln and Omaha on four of the fourteen flights and what percentage of the total is local business. It is insignificant. Furthermore, if the State cares to find some constitutional way to tax local business, even though carried on by an interstate instrumentality, that is a matter of no concern in this case.

The concern is with the right of the State of Nebraska to levy an ad valorem tax upon an aircraft engaged in interstate commerce which use no state facilities. Obviously, the use tax case is constitutionally valid only if the tax is in exchange for state benefits conferred or as pay for the use of facilities, for protection, for reciprocal rights, or for the maintenance of roads and highways and other facilities used by the interstate carrier.

The evidence surrounding the flights of aircraft in and out of the airport, and the tax purpose make it obvious that the Nebraska tax in question bears no rela-

tionship whatever to the uses and privileges that were sufficient to sustain the tax in such of the seven cases cited where a state tax was upheld.

The *Willett Co.* case (1953) in Chicago involved a typical road tax, and therefore it was upheld even though there were strong dissenting opinions even in that case because of the impact of the Commerce Clause. The dissenters emphasized that the tax should not be levied upon those carters that were doing an interstate business when the intrastate business and the interstate business were, from the evidence apparently, readily discernible. The Illinois court held the Chicago ordinance invalid because it required an annual license tax on every truck that used the highways in and out of Chicago as well as only within Chicago. If a discernment between intrastate and interstate business would enlighten the court the taxpayer failed to make it.

“* * * It was a tax intended to fall on business done within the city that levies it, although in part it is imposed on carriers of intrastate and interstate commerce inseparably commingled.”

It was a tax for the use of the highway. It was for the courts to determine, as a matter of law, whether the highways were or were not used by the taxpayer. It was for the taxpayer to prove that he made no use of the highways of Chicago for which the tax was levied.

In the *Lloyd A. Fry Roofing Co.* case (1952) this Court was presented with the complaint of truck drivers owning and operating trucks for hire within Arkansas. Before using the highways, truck drivers were required to obtain a permit, and it made no exception for any

user. The money obviously was used for highway purposes. There was no discretion lodged in the State of Arkansas to determine whether it should or should not grant the permit. A permit based on convenience and necessity requiring state discretion would be void. This case is cited to emphasize further that the Nebraska tax is neither a permit nor a license to use anything that Nebraska has to furnish. It is the reasoning advanced by the advocates of the validity of the Nebraska act that prompts this full discussion of use tax cases.

In late 1953 a three-judge federal court in Iowa, in the *Dohrn* case cited, exhaustively examined the types of licenses, permits, and taxes that are or are not repugnant to the Commerce Clause of the Federal Constitution. Generally, if anything is left to the discretion of the state, the tax is void as being repugnant to the Commerce Clause as applied to interstate carriers. This is true even though such interstate carrier crosses over and into parts of the state and while in the state does an intrastate business.

Again by analogy, the Nebraska tax in question, by whatever name called, cannot be held valid as a benefit tax. The opinion below even applies the word "use" to operations of the aircraft in Nebraska. Nor was the writer of the opinion below able to escape the phrase, "in and through the State of Nebraska," when applied to the aircraft. These expressions prove reversible error when the factual situation that there was no "use" and no commerce "in and through" the State by the aircraft as shown by the Stipulation of Facts.

Not always has the High Court held taxes for the use of state highways valid. Some have been held repugnant to the Commerce Clause of the Federal Constitution. The *Spector* case is an example for the invalidity in the instant case. The *Spector* case held the Commerce Clause nullified

“a state tax imposed upon the franchise of a foreign corporation for the privilege of doing business within the State when (1) the business consists solely of interstate commerce, and (2) the tax is computed at a nondiscriminatory rate on that part of the corporation's net income which is reasonably attributable to its business activities within the State. For the reasons hereinafter stated, we hold this application of the tax invalid.”

The Nebraska tax in question, if it is anything, is actually for the privilege and the right to do interstate business in Nebraska in air commerce. It might well be reasoned that some tax should be paid for the right to do business within the State because of the business benefits to appellant and that the privilege of picking up passengers, freight, mail, and express at the Omaha airport and moving them out of the State, even in interstate commerce, results in a benefit that flows from the State of Nebraska to enrich the appellant.

It may be argued, then, why should not Nebraska be entitled to require the appellant corporation to pay its share of the general upkeep of Nebraska, for without general taxes there could be no efficient state government. The answer is set forth under Law Point I, i. e., that the Commerce Clause of the Federal Constitution prohibits that very argument as the basis for upholding a general revenue-producing tax, such as the Nebraska act in question. The exceptions are set forth among the

seven cited cases. The difference is made clear in the *Spector* case. The Nebraska statute bears no relationship to the use of facilities, or other reciprocal benefits.

The tax in question is not a privilege tax upon the intrastate business that is done by the appellant herein in Nebraska. It is not an income tax based upon that intrastate business. It falls outside the category of pay for any facilities that Nebraska has furnished. Consequently, it can result in only a void general tax, no matter how favorable the argument may seem to be in its behalf as beneficial to Nebraska.

The *Spector* case concludes with the following significant pronouncement of the High Court:

"In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—*McCulloch v. Maryland*, supra" (4 Wheat. 316, 425-437, 4 L. Ed. 579).

No doubt the appellant airline solicits business in Nebraska. It does so as a foreign corporation, maintains no shops, no warehouses, no repair depot, no airport of its own and no executive offices. It carries no large bank balances in the State. Yet it derives a substantial income from the State of Nebraska, as shown by the tax formula, which comes only through its solicitation of business in the State. Such facts will not sustain the tax in question against the protection of the Commerce Clause.

In the *Memphis Steam Laundry* case cited the late Chief Justice Vinson delivered the opinion of the Court

and held the tax invalid and reversed the state court, which had held as follows:

“ * * * The tax involved here is not a tax on interstate commerce, but a tax on a person soliciting business for a laundry not licensed in this state, a local activity which applies to residents and non-residents alike.”

The High Court opinion stated:

“The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not ‘a tax on interstate commerce’.”

The Court held that it was a tax on interstate commerce and therefore repugnant to the Commerce Clause and the law held invalid.

This *Memphis Laundry* case is cited in an effort to bring out the fact that no matter what the label might be on the Nebraska tax this question must be answered: Just what is the purpose of the tax? If it were permissible to tax the appellant as a nonresident of Nebraska, for sending its aircraft from the nontaxable air space above the United States down to Nebraska to pick up passengers and cargo solely in intrastate commerce, which business had been solicited ahead of time in Nebraska, then perhaps there might be some validity to a tax on the vehicle.

In deference to the Commerce Clause of the Federal Constitution, the *Memphis* case is authority for the fact that the soliciting of business within a state by one not licensed therein but doing an interstate business, of which the solicited business is a part, is protected by the Com-

merce Clause, and such tax levied upon one's trucks or the individual person doing the solicitation is void under the Commerce Clause. The opinion sums up as follows:

"To sum up, we hold that the tax before us infringes the Commerce Clause under either interpretation of the operating incidence of the tax. The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states. The tax imposed in this case made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause."

Appellant maintains that the Nebraska tax is a burden upon interstate commerce and an obstruction to the administration of the Civil Aeronautics Code and is void.

**Argument to Sustain Law Point III and Establish
Specification of Errors 4, 5, 11, and 12**

This point and the Specification of Errors pertain to a statutory fact, i. e., Congress has heretofore pre-empted the field of aviation. The Civil Aeronautics Code became effective June 23, 1938. What effect does such pre-emption have upon the validity of the tax in question? Admittedly the tax is upon an instrumentality that is covered by the National Act. Appellant's aircraft fully equipped for flight, by the very wording of the state statute, while engaged in interstate commerce, are the incident of the tax. The findings of the court below and the Stipulation of Facts between the parties so prove (App. B and C).

Appellant presents pre-emption from the standpoint that nothing is left for the state to confer by way of

benefit for the tax, and the state is denied the right to tax the aircraft for general revenue purposes.

In the *California-United Air Lines* case cited, decided by this Court in late 1953, the Public Utility Commission of California would seem to have jurisdiction of rates in reference to air transportation within its own jurisdiction, ~~but it does not~~. It does in reference to land and inland water transportation within its boundaries unless the intrastate materially affects interstate commerce by placing a burden thereon. But not so with aerial transportation. By the Civil Aeronautics Code Congress pre-empted aviation, ^{but not} in reference to the matter that was claimed before the California Commission.

The Civil Aeronautics Code has been summarized for the convenience of the Court on pages 7 to 10 hereof.

The ~~for current~~ ^{dissecting} opinion in the *California-United Air Lines* case stated:

"* * * There is that kind of jurisdictional controversy here, for a federal agency claims that a state commission may not act because Congress put the matter exclusively in the federal domain. In a case less clear than this we enjoined state proceedings after concluding that Congress had pre-empted the field. *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447. By the same token we should settle this controversy at this early stage. By denying relief we advance no cause except that of litigation."

The Civil Aeronautics Act goes farther than to pre-empt the field of aviation activities throughout the United States. It covers intrastate aviation activities as well,

as will be found in the cited cases under Law Point III. Some of these will be reviewed herein.

To bring the pre-emption closer as a basis for the invalidity of the state tax in question, the Civil Aeronautics Code recites in Section 403 (52 Stat. 980, 49 U. S. C., Chap. 9),

“There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit of air commerce through the navigable air space of the United States. June 23, 1938, c. 601, Title I, § 3, 52 Stat. 980.”

Thus, two parts of the Civil Aeronautics Code are before this Court for consideration in reference to the ad valorem tax on aircraft imposed by Nebraska while aircraft are engaged in interstate commerce. The federal law places the aircraft in question in all its movements into the public domain. This holds true when it flies over and around the air space above Nebraska. Aircraft do not fly through Nebraska in any sense of the word. They alight in Nebraska at the airport, for which appellant pays a substantial charge or use tax, as shown in the opinion below as well as in the Stipulation of Facts.

In the *Blalock* case cited, Georgia had enacted a recording statute. The Civil Aeronautics Act also had a recording requirement for aircraft which governed over a state recordation act. The highest court of Georgia held:

“The appellate court, reversing a judgment for plaintiff, held that the Civil Aeronautics Act was applicable, although the airplane was operated and intended to be operated only in intrastate commerce,

and hence that the unrecorded prior transfer to the plaintiff was not good as against the defendant."

This case is cited to illustrate an instance where a state gave or assured no priorities in state benefits in reference to aircraft transfers within the state.

In the *Causby case* (1946) the High Court construed the Civil Aeronautics Code in reference to flights over private lands so low as to cause injury to the property of the owners thereon. The important pronouncement in the case by this Court is as follows:

"It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim."

In many of the cases, even after 1938, the declaration (Sec. 403) in the Civil Aeronautics Code was overlooked entirely. Some state cases assume states continued to have jurisdiction over the air above them. But they have not. Nebraska has no such jurisdiction. No safety measures for flight are created from the funds derived from the tax in question.

The *Lichten case* (2 C. A., 1951) involved the loss of jewelry by an air passenger who claimed it was lost by

the mishandling of the plaintiff's baggage in New York. The Court of Appeals held:

"A primary purpose of the Civil Aeronautics Act is to assure uniformity of rates and services to all persons using the facilities of air carriers. * * * To achieve this, it is essential, in the judgment of Congress, that a single agency, rather than numerous courts under diverse laws, have primary responsibility for supervising rates and services."

Pre-emption supplies what formerly was state protection. Another step into the national jurisdiction is proven.

In the *Rosenhan* case certiorari was denied. Rosenhan was found guilty of flying his aircraft without obtaining a certificate of airworthiness required by the Civil Aeronautics Code. His defense was that his operations were purely intrastate and his flights were in and out of an airport within the state of Utah. He further claimed that under the Tenth Amendment to the Constitution the rights in question were reserved to the sovereign state of Utah, but the Court of Appeals held that the rights were in the Federal Government under the Commerce Clause and further that the Civil Aeronautics Board was supreme in carrying out the Congressional Act.

The defendant's answer

" * * * admitted that on the dates specified he operated a civil aircraft in the designated airway without having currently in effect an airworthiness certificate for the said aircraft from the Federal authority, as authorized by Section 603(c) of the Act, 49 U. S. C. A. § 553(c), but alleged that there was currently in effect, on the specified dates, an airworthiness certificate on said aircraft issued by the

Utah State Aeronautics Commission, and that his operations of the aircraft, although within the federally designated airway, were wholly within the state of Utah, were not a part of interstate or foreign air commerce, and did not remotely affect interstate commerce."

The court stated:

" * * * The constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

" * * * if the Act bears some reasonable and rational relationship to the subject over which it has assumed to act, the power is supreme and may not be denied, although it may include within its scope activities which are intrastate in character. * * *"

The defendant was adjudged guilty of having violated the C. A. Code.

In the *Drumm* case cited a similar holding was made in 1944 under similar circumstances by the United States District Court in Nevada, and likewise in the *Perko* case in 1952 in Minnesota. The latter case proves the field of aviation has been pre-empted to the extent of the Civil Aeronautics Authority being clothed with the power to prevent aircraft from flying over certain parts of the State of Minnesota. This proves that the Federal Government, while dedicating the air space above the United States to citizens, retains and reserves to the National Government the control of aviation even to the extent of prohibiting flight over parts of a state in intrastate flight.

This theory was made clear in the *Waterman* case (1948) when this Court held that even judicial review

in connection with matters affecting civil aeronautics under the act of 1938 may not follow the pattern of foreign commerce by rail and water; that air commerce has been placed in an exclusive category of its own and has removed air commerce from laws that are applicable to land and inland waters. The High Court stated in reference to the Civil Aeronautics Code as follows:

“Congress has set up a comprehensive scheme for regulation of common carriers by air. Many statutory provisions apply indifferently whether the carrier is a foreign air carrier or a citizen air carrier, and whether the carriage involved is ‘interstate air commerce,’ ‘overseas air commerce’ or ‘foreign air commerce,’ each being appropriately defined. 49 U. S. C., § 401(20), 49 U. S. C. A. § 401(20). All carriers by similar procedures must obtain from the Board certificates of convenience and necessity by showing a public interest in establishment of the route and the applicant’s ability to serve it.

* * * * *

“We find no indication that Congress either entertained or fostered the narrow concept that air-borne commerce is a mere outgrowth or overgrowth of surface-bound transport. Of course, air transportation, water transportation, rail transportation and motor transportation all have a kinship in that all are forms of transportation and their common features of public carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. A way of travel which quickly escapes the bounds of

local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past. While transport by land and by sea began before any existing government was established and their respective customs and practices matured into bodies of carrier law independently of legislation, air transport burst suddenly upon modern government, offering new advantages, demanding new rights and carrying new threats which society could meet with timely adjustments only by prompt invocation of legislative authority. However useful parallels with older forms of transit may be in adjudicating private rights, we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit."

Upon principle and authority, the State of Nebraska may not justify its *ad valorem* tax for revenue purposes upon any protection, civil or criminal, that it grants to aircraft of the appellant flying in and out of Nebraska in interstate flight. Under the comity between states permitting movement of citizens and their property back and forth across the United States, each State owes to the other the ordinary protection, rights, and privileges afforded to all persons, for which no tax is required. Automotors traveling in interstate commerce across Nebraska are entitled to some police protection and to share in the general welfare and are free from taxation therefor. It should apply to aircraft as well.

If, in the operation of the aircraft in question over Nebraska or at the airport, there should be liability for property or personal damages, either party would be en-

titled to a hearing in the federal court, or possibly before the Civil Aeronautics Board, or possibly in the State courts of Nebraska. Here, again, comity comes into play. The tax in question should not be upheld because of individual rights that may arise in such circumstances. Other nonresident litigants are not taxed for such judicial services.

Certainly with the field of aeronautics pre-empted, there exists no basis for the ad valorem tax on the aircraft.

Reference has been made to the text of various appropriations under Law Point III to prove that Congress continues to aid airport development throughout the nation as well as aid in the further and better development of the very aircraft that is the subject matter of this lawsuit. Congress fosters greater experiments for the protection of the public that avail themselves of flight. Accordingly Congress has provided for supervision and experiments at the expense of the government. Persons are trained by the government for inspectors and supervisors for service over all aerial commerce throughout the nation.

Under such state of the law and the admitted facts, any interference by property tax on aircraft flying in and out of Nebraska is a burden upon commerce and hampers the administration of the Civil Aeronautics Code.

Appellant concludes that the pre-emption voids the tax. Most certainly it does so when construed in conjunction with the Commerce Clause applied to aerial

flight and aircraft in interstate commerce under the supervision, direction, and control of the Civil Aeronautics Code

**Argument to Sustain Law Point IV and Establish
Specification of Errors 1 and 8**

Under this Law Point IV appellant answers the errors in the opinion of the court below that the tax in question being an apportioned tax to reach the valuation of the aircraft for ad valorem tax purposes and the aircraft abiding within Nebraska is therefore valid.

Cases are cited in the opinion below, such as *Ott, Pullman, Standard Oil v. Peck, Johnson Oil*, and others which appellant has collected under Point IV. Those cases have the question of a proportional tax involved. The court below held the tax in question valid because it was an apportioned tax, and therefore a fair one.

It becomes necessary, therefore, to point out the differences between the case at bar, which has to do solely with flight in the public domain under the jurisdiction of the Federal Government, and land and inland water commerce, that lies solely within the jurisdiction of the taxing state. All the cases under Point IV have to do with the valuation of personal property for tax purposes used in interstate commerce and taxable because lying within the state sufficiently to attain a taxable situs therein.

The principle involved and which should properly be considered at this point in the brief is the status of the thing to be taxed by a state—the aircraft. Obviously a state may tax personal property within its borders only if that personal property has attained a taxable situs

within the state. The question of proportional valuation, therefore, is secondary to the primary question that first must be answered whether or not a taxable situs of the aircraft exists as defined in the law.

Later under this Point IV will be discussed the power of the state of creation of a corporation to levy taxes upon that corporation which it has placed into being under its laws, such as *New York Central*, *Northwest Airlines*, and as further exemplified by the exceptions set forth in *Standard Oil v. Peck*.

In the *Johnson Oil*, *Nashville-Browning*, *Ott*, *Pullman*, and *Smoot* cases and every other case of similar setting where the ad valorem tax on property was upheld, it was upheld only upon evidence that the taxed property had attained a taxable situs within the state. The proportional taxing theory followed to aid in the holding of validity by obtaining a proper and legal valuation.

For example, in the *Johnson Oil* case the court held:

“The basis of the jurisdiction is the habitual employment of the property within the state. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the state is subject. When a fleet of cars is habitually employed in several states—the individual cars constantly running in and out of each state—it cannot be said that any one of the states is entitled to tax the entire number of cars regardless of their use in the other states. * * *

“Applying these principles, no ground appears for the taxation of all the cars of the appellant in Oklahoma. It is true that the cars went out from and returned to Oklahoma, being loaded and reloaded at the refinery, but they also entered and were em-

ployed in other states where the oil was delivered. Oklahoma was entitled to tax its proper share of the property employed in the course of business which these records disclose, and this amount could be determined by taking the number of cars which on the average were found to be physically present within the state."

Illinois was the State of creation. The oil refineries were located in Oklahoma. There were present in Oklahoma, according to the decision, a large number of cars at all times using the facilities of the State in land commerce. The operation of tank cars and the refining of oil have never been pre-empted by Congress. By their very nature such instrumentalities remain within the State for long periods of time under state protection.

In the case at bar no such situation exists as with tank cars carrying oil from and to refineries in the taxing State. The aircraft in question at no time attained a taxable situs within the State. The peculiar nature of the aircraft as the incident of the tax precludes a taxable situs. The aircraft in question came in on fourteen regular schedules, but they did not traverse the highways or the byways of the State. They paid for the privilege of landing from the public domain at the Omaha airport to the extent in 1951 of \$22,000. This privilege of landing at the airport and using the depot may be likened to the right of wharfage set forth in *Gibbons v. Ogden* and approved in *McCulloch v. Maryland*. The principle announced in both these great cases places the aircraft of appellant beyond the taxing jurisdiction of Nebraska, while the principle announced in the *Johnson-Oklahoma* case places the power to tax property attaining a tax situs therein squarely within the power of the state.

The *Pullman* case in 1891, which is the forerunner of the proportional taxing theory, recognizes at the outset that it is necessary to have a taxable situs first:

“ * * * Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States at the domicile of their owners, in one state, are not subject to taxation in another state at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and therefore can be taxed only at their legal situs,—their home port, and the domicile of their owners. * * * ”

The above quotation from the *Pullman* case includes the statement that certain instrumentalities may be taxed only at “their home port, and the domicile of their owners.” In this last phrase theoretical taxation comes into question. In the home port state (which might also be the state of creation) personal property that is outside the taxing jurisdiction of the state throughout the tax years may not be taxed as property within the state.

In the *Peck* case the Court said:

“ * * * The vessels neither pick up oil nor discharge it in Ohio. The main terminals are in Tennessee, Indiana, Kentucky, and Louisiana. * * * The vessels were registered in Cincinnati, Ohio, but only stopped in Ohio for occasional fuel or repairs.”

Ohio was the state of domicile. The tax was held invalid on vessels continuously away from Ohio.

In the *Ott* case the barges, tugs, and vessels were sought to be taxed by the State of Louisiana because the vessels, tugs, and barges were present in Louisiana sufficiently to attain a taxable situs therein. They came there to transact business within the state, but could do so only by remaining there for long periods of time and using state facilities. A similar status fails to support the decision below. The barges and ships that were anchored in Louisiana had attained a taxable situs therein. Not so with the aircraft.

The opinion that validated the Louisiana ad valorem tax was based upon the following statement by the court:

“ * * * It is said in this case that the visits of the vessels to Louisiana were sporadic and for fractional periods of the year only and that there was no average number of vessels in the state every day.”

The district court denied the right to tax. The United States Supreme Court said, in reference to the facts re situs in Louisiana:

“We do not stop to resolve the question. Louisiana’s Attorney General states in his brief that the statute ‘was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the taxing year.’ * * *”

The district court did work out the formula of the number of miles that the barges in question traversed the streams; the number of miles they travelled in Louisiana; the amount of time tied to the wharves in Louisiana as compared to the same factors outside the state. The district court denied the tax. The proportional theory to arrive at the valuation of the tugs and barges was

held by the United States Supreme Court to be proper, but only on the basis that barges and tugs had attained a permanent situs within the State of Louisiana. Thus the distinction with the aircraft in the case at bar, which attained no taxable situs whatever within the State of Nebraska. Aircraft alighted from its own domain only at the airport on interstate business, then ascended into its own domain.

If the aircraft traveled about the lands of the State, crossed over its borders in and out of the State, and were tied up here and there in its interstate and intrastate business and attain a taxable situs within the State, gauged the same as other property, a different question would arise. The incident of the tax precludes such analogy. It cannot be said, in applying the proportional theory to arrive at valuation in reference to rolling stock and tugs and barges on inland waterways, that the manner in which the aircraft came to Nebraska and left Nebraska are akin. Nor should the nontaxable situation be diverted into a taxable one because the aircraft came to Nebraska and alighted to load and unload interstate passengers for from five to twenty minutes each time on regular schedules.

Louisiana had something to exchange for the tax in the *Ott* case. It gave its protection. It had to consider the taxable situs of other tugs and barges engaged in the same kind of business, but kept within the borders of Louisiana.

In the case at bar the Nebraska statute itself specifies that only the interstate aircraft are subject to the proportional property tax in question. The aircraft that are

based at one airport in Nebraska pay the regular ad valorem tax on the appraised value of each aircraft the same as on the appraised value of other personal property located in the state.

In the *Nashville Railroad* case (1940) cited, the principal question was over the amount of the assessment and whether or not under the proportional taxing theory based on a percentage derived from mileage within the state and mileage without the state, the railroad was discriminated against. The question arose under the Due Process Clause and the Equal Protection Clause of the Federal Constitution. The Commerce Clause was only incidentally raised. The Court held that the property must have a taxable situs within the state if the method of assessing the property within the state on a proportional theory to find valuation is to be valid. The Court stated:

“ * * * In tapping these common sources of revenue a state cannot, we have held, use a fiscal formula, whatever may be its appearance of certitude, to project the taxing power of the state plainly beyond its borders. *Wallace v. Hines*, 253 U. S. 66, 40 S. Ct. 435, 64 L. Ed. 782. In the light of these principles, Tennessee has not overstepped its bounds.”

In the *Smoot Sand & Gravel* case the property to be taxed and evaluated on a proportional basis or a mileage basis within the District of Columbia was found to have a taxable situs within the state. Mr. Justice Fahy, for the Court of Appeals, said:

“ * * * By virtue of their extensive, habitual and continuous use in business in the District of Columbia, we think these properties have a tax situs here. They are in a tax sense more or less perma-

nently located in the District though not always here in the same permanent sense as real estate."

The opinions of the District Court and the Court of Appeals in the *Smoot* case clearly set forth that the tugs and barges were in motion in the District of Columbia practically all the time, or were tied up to the wharves in the District. *Smoot* sought to escape the District taxation simply because it also made trips into Maryland carrying sand and gravel and building materials with the same instrumentalities and did so frequently.

None of these instrumentalities may be likened to the aircraft because in each cited case, as repeatedly stated herein, the vehicles for land or inland water commerce readily attain a taxable situs within the state sufficient, as a matter of fact, for a court to rule as a matter of law that a genuine taxable situs existed rather than a mythical or theoretical situs for taxation.

In the *Northwestern Airlines* case (1944) the majority and concurring opinion states important principles of law applicable to the case at bar. The *Northwest* case dealt with a tax on aircraft. It was an ad valorem tax. Minnesota adjudged the valuation of all aircraft and held all were within the state on May first or sufficiently within the taxable year 1939, and taxed accordingly.

The State of Minnesota was the state of creation or domicile and also the home port of the airline to which port every aircraft was required to return for purposes other than interstate flight. Under the Civil Aeronautics Code those airplanes, just as in the case at bar, were required after fifty hours of flight to return for government inspection to the home port. There, at St. Paul,

every part of the plane itself, all its removable equipment, the pilots, and other personnel, were relicensed by the government after inspection, tests and examinations. Each engine was required to be overhauled and, wherever CA inspector determined, block-tested for a number of hours outside the plane. Whenever planes were idle or otherwise laid up, they were stored at the home port at the Minneapolis-St. Paul Aid Field. The same situation applies to appellant's aircraft, as its "home port" is likewise the same air field at St. Paul.

The facts in *Northwest* warranted the High Court in holding that the ad valorem tax on the aircraft should be based upon Minnesota being the home port and the state of creation; that the planes were within Minnesota for taxable purposes for long periods of time and continuously throughout the year. Whether taxed elsewhere or with what effect on the Minnesota tax was not before the Court for decision. So the aircraft of Northwest Airlines were taxed under the following statement by the Court:

"* * * On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other State. * * *"

Nebraska is neither the home port nor State of domicile of appellant.

In *Standard Oil Co. v. Peck*, as above stated, theoretical taxation by Ohio was urged because the state of creation as well as the home port state, was Ohio. The Court held Ohio could make no valid claim that the tugs and barges were within its borders during the taxable

year. Ohio was denied the right to tax except for a number of the tugs and barges that the evidence showed were present and attained a taxable situs within the State of Ohio. The all-important taxable situs governed the decision regardless of domicile of the owner or abode of the tugs.

In the opinion in the *Northwest* case, pronouncements were made to the effect that the proportional taxing theory is inapplicable to aircraft because of the nature of their operation and use. Here follow a number of such statements from the opinion:

297. "The doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced by *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613, is here inapplicable. The principle of that case is that a non-domiciliary State may tax an interstate carrier 'engaged in running railroad cars into, through, and out of the state, and having at all times a large number of cars within the state * * * by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in all the states over which its cars are run.' *Union Refrigerator Transit Co. v. Kentucky*, supra, 26 S. C. at page 38. This principle was successively extended to the old means of transportation and communication, such as express companies and telegraph systems. But the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce visiting for fractional periods of the taxing year. (Thus, for instances, the coaches of the company * * * are daily passing from one end of the state to the other * * *." (Citing the *Pullman* case.)

302. "We are at a stage in development of air commerce roughly comparable to that of steamship navigation in 1824 when *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, came before this Court. Any authorization of local burdens on our national air commerce will lead to their multiplication in this country. Moreover, such an example is not likely to be neglected by other revenue-needy nations as international air transport expands."

303. "Students of our legal evolution know how this Court interpreted the Commerce Clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. (Cites *Gibbons v. Ogden*, to *U. S. v. Appalachian Electric Power Co.*, 311 U. S. 377, 61 S. Ct. 291, 85 L. Ed 243). Air as an element in which to navigate is even more inevitably federalized by the Commerce Clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."

In the *Northwest* case no specific reference was made to Section 403 of the Civil Aeronautics Code, which declares the navigable air space of the United States for the use of flight by any citizen.

The following parts of the *Northwest* opinion and concurring opinions are in point:

"* * * It (Congress) may exact a single uniform federal tax on the property or the business to the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether."

304. "Certainly today flight over a state either casually or on regular routes and schedules confers no jurisdiction to tax. * * * Undoubtedly a plane,

like any other article of personal property, could land or remain within a state in such a way as to become a part of the property within the state. But when a plane lands to receive and discharge passengers, to undergo servicing or repairs, or to await a convenient departing schedule, it does not in my opinion lose its character as a plane in transit. Long ago this Court held that the landing of a ship within the ports of a state for similar purposes did not confer jurisdiction to tax. * * * I cannot consider that to alight out of the skies onto a landing field and take off again into the air confers any greater taxing jurisdiction on a state than for a ship for the same purposes to come alongside a wharf on the water and get under way again."

305. " * * * It might be difficult, in view of the complete control of this type of activity by the Federal Government, to find what benefits or protection any state extends. * * * "

306. "The apportionment theory is a mongrel one, a cross between a desire not to interfere with state taxation and desire at the same time not utterly to crush out interstate commerce. * * * Nothing either in theory or in practice commends it for transfer to air commerce. A state has a different relation to rolling stock of railroads than it has to airplanes. Rolling stock is useless without surface rights and continuous structures on every inch of land over which it operates. Surface rights the railroad has acquired from the state or under its law. There is a physical basis within the state for the taxation of rolling stock which is lacking in the case of airplanes."

314 footnote. " * * * For vessels ordinarily move on the high seas, outside the jurisdiction of any state, and merely touch briefly at ports within a state. Hence they acquire no tax situs in any of the states at which they touch port, and are taxable by the domicile or not at all. * * * "

In the last quotation from the *Northwest* case reference is made to vessels on the high seas and their taxable status. Because of the similarity between the applicable legal principles to the vessels coming in from the high seas and the aircraft coming in from the skies above, appellant has made its Fifth Law Point to prove the legal parallelism between seagoing vessels and aircraft.

**Argument to Sustain Law Point V and Establish
Specification of Errors 7, 9, and 10**

Under Law Points II and III the cases have been reviewed in reference to the *use tax* for highways and the *proportional tax* on rolling stock and inland watercraft. The distinction was definitely made in each instance that either there was a privilege or use tax for the facilities offered, such as the highways, or a sufficient taxable situs attained within the State by the transaction of business therein with the railroad cars, tugs, barges, or boats as company property remaining within the State.

However, vessels coming in from the high seas to a port or in coastwise trade among the states have ever been held free from an ad valorem tax on these vessels by the states they visit in interstate commerce. In every instance wharfage charges were permitted if the wharves were used. Taxes or charges for stevedoring, tugboats that piloted the ship into the port, and taxes for similar facilities were held outside the pale of the constitutional protection of interstate or international commerce. Taxes have been held valid even if the vessels failed to use the facilities provided. No case exists where a vessel from the high seas and engaged in interstate commerce among

the states was held taxable by a state when it came into the port and carried on its interstate business. Nor has any state been permitted to collect a tax merely because there was no showing that the home port or domicile of the vessel did or did not tax.

Whether or not such vessel or such aircraft, as in the case at bar, shall escape taxation is for Congress to govern. The failure of a domiciliary or home port state to tax the instrumentalities forms no basis for an ad valorem tax by another state visited in interstate commerce.

Congress alone may tax for the use of such facilities as it furnishes for navigation on the seas or in the air, if it elects to do so. The air space of the United States has been dedicated to the public for aerial navigation. The high seas have ever been in the public domain and free for navigation. The air space above the United States now has the same legal status.

In *Gibbons v. Ogden* the restriction on state taxation, control or regulation of seagoing craft is made clear. The law then stands as the law of today. The aircraft in question are taxed for the privilege of alighting at the airport. Appellant pays taxes for that privilege. Appellant pays taxes on gasoline in large amounts levied by the State of Nebraska. The gasoline tax is used by the State for the purpose of aiding in the maintenance and upkeep of the airports in Nebraska. The landing charges at the airport are based on the number of landings and takeoffs at the airport made by the aircraft in question.

In *Gibbons v. Ogden* it was said:

“* * * As to laws affecting ferries, turnpike roads, and other subjects of the same class, so far from meriting the epithet of commercial regulations, they are, in fact, commercial facilities, for which, by the consent of mankind, a compensation is paid, upon the same principles that the whole commercial world submit to pay light money to the Danes. * * *”

In the *Hays* case (1854), cited and repeatedly quoted from and recently cited in many opinions of the Supreme Court of the United States, it is held:

“An ocean steamer, owned and registered in New York, and regularly plying between Panama and San Francisco, and ports in Oregon, remaining in San Francisco no longer than is necessary to land and receive passengers and cargo and in Benicia, only for repairs and supplies, is not subject to taxation by the State of California.”

The opinion states:

“The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another State, is familiar in the admiralty law, and she is subjected, in many cases, to the application of a different set of principles. 7 Pet. 324; 4 Wheat. 438.”

In *Morgan v. Parham* (1872) cited, the question arose as to the effect of registration and the home port theory of taxation. But the real question in the case was whether or not the vessel which was registered in New York as its domicile and home port could be taxed in Mobile, Alabama, where it came and went in coastwise trade among the states. The opinion emphasizes that the only question involved was the taxable status of the vessel itself. The Court said:

“There was nothing, therefore, in her enrolment in the port of Mobile that affected her registry in New York, or her ownership in that place, or that tended to subject her to the taxation of the State of Alabama, under the circumstances stated.

“It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the States with its situs at the home port of New York, where it belonged and where its owner was liable to be taxed for its value. * * *”

It will be noted that Congress did not pre-empt the field of navigation as completely as it has the field of aviation. The case cited indicates that the vessel might be taxed at its home port of New York. Under *Standard Oil Co. v. Peck* the vessel could be taxed at the home port providing the vessel of commerce had attained an actual taxable situs there, not otherwise.

In the case at bar the question arises whether or not the lack of taxation by the domiciliary state creates a dilemma in connection with aerial navigation of which the State of Nebraska may take advantage. The opinion below is based in part upon that presumption.

The Court below erred. In this great and fast-expanding and developing new field for flight there is the certainty that aircraft should escape an ad valorem state tax in those states visited only in interstate commerce. It does not follow that the aircraft may escape national

taxation for the national facilities furnished which the air carriers adopt or use. But it does follow that the aircraft must come to port throughout the taxable year at some time and at some designated place other than for interstate commerce. The Stipulation of Facts in the case at bar states that such place for appellant is the Wold-Chamberlain Air Field at St. Paul, Minnesota. No doubt there are other ports to which the planes must come and be stored, overhauled, inspected, repaired, and relicensed.

Congress has pre-empted the field of aviation and has financed many of its facilities. If Congress elects to tax for the facilities it provides and keeps available in the future over the integrated system of national airways, control towers, radio, and lights, aviation may be required "to pay light money to the Danes."

CONCLUSION

Under the facts stipulated in this case and the law and the authorities cited under five Law Points, the errors of the court below are made clear and justify reversal.

In reversing the case and nullifying the Nebraska ad valorem taxing statute directed against appellant's aircraft while engaged in interstate commerce in Nebraska, the Court may properly do so on the grounds that the statute in question is repugnant to Article I, Section 8, Clause 3, of the Federal Constitution.

Dated at Omaha, Nebraska, February 15, 1954.

Respectfully submitted,

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Of Counsel.

APPENDIX "A"

OPINION OF THE SUPREME COURT OF NEBRASKA

MID-CONTINENT AIRLINES, INC., now Braniff Airways,
Incorporated,

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT,
ET AL.

No. 33,260

Filed July 17, 1953

1. Taxation: Constitution and Law. Statutes providing for the levy of an *ad valorem* personal property tax on flight equipment used in interstate commerce, when such flight equipment is wholly and continuously outside of the state of the owner's domicile during the tax year, is not violative of the Commerce Clause of the Constitution of the United States when such tax bears a fair and reasonable relation to the use of the property in the taxing state.

2. Sections 77-1244 to 77-1250, R. R. S. 1943, on the grounds here challenged, held not violative of Article I, section 9, clause 6, Article I, section 10, clause 3, or Article I, section 8, clause 3, of the Constitution of the United States.

Original action. Action dismissed.

William J. Hotz, William Hotz, Jr., William F. Dalton and Robert M. Kane, for plaintiff.

Clarence S. Beck, Attorney General, and C. C. Sheldon, for defendants.

Heard before Simmons, C. J., Carter, Messmore, Yeager, Chappell, Wenke, and Boslaugh, JJ.

CARTER, J.:

This is an original action for a declaratory judgment commenced in this court to test the validity of sections 77-1244 to 77-1250, R. R. S. 1943. Such sections of the statutes authorize the assessment, levy, and collection of an

ad valorem personal property tax against plaintiff's flight equipment used in interstate commerce. Plaintiff contends that such taxation violates Article I, section 8, clause 3, of the Constitution of the United States, commonly referred to as the Commerce Clause. The defendants deny the unconstitutionality of the Nebraska act and assert the right to impose an ad valorem personal property tax upon plaintiff's flight equipment which is used within the state as a part of a system of interstate air commerce over fixed routes on regular schedules, so long as the allocation of the proportionate part of the property value and the levy thereon bear a fair and reasonable relation to the use of such flight equipment within the state. Briefly this constitutes the issue before the court.

Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in that state. The main executive offices of the plaintiff were in Kansas City, Missouri, until the consolidation of plaintiff with the Braniff Airways, Incorporated was effected on or about August 1, 1952, at which time such offices were moved to Dallas, Texas. It is stipulated that Braniff Airways, Incorporated, is substituted for Mid-Continent Airlines, Incorporated, as the party plaintiff. The home port to which all its fleet of planes must return is Minneapolis and St. Paul, Minnesota. Plaintiff is licensed by the Civil Aeronautics Board of the United States to engage in interstate transportation by air for hire under the provisions of Title 49, U. S. C. A., sections 401 to 705. Pursuant to such authority it operates a large number of aircraft upon regular schedules in trunk line flight from Minot, North Dakota, to New Orleans, Louisiana, making regular landings in North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Illinois, Kansas, Missouri, Oklahoma, Arkansas, Texas, and Louisiana. No planes land in plaintiff's domiciliary state of Delaware. Plaintiff operates over 7,336 of unduplicated route miles. Plaintiff's activities in Nebraska consist of making landings at Omaha and Lincoln on regularly scheduled stops on interstate flights. There are 14 of such

flights in and out of Omaha each day and 4 such flights in and out of Lincoln. These stops are made to handle mail, express, freight, and passengers and are usually of short duration, generally from 5 to 20 minutes. The home port for all planes here involved is the Wold-Chamberlain Air Field at St. Paul, Minnesota, where hangars, repair shops, and equipment are maintained. Municipal and federal government facilities are used at Omaha and Lincoln. The flight distance from Omaha to Lincoln is 60 miles and from Lincoln to Rulo it is 90 miles, these being the only routes traveled by any of plaintiff's planes in Nebraska within the limits of aerial routes specifically assigned by the Civil Aeronautics Administration. It is not disputed that plaintiff's operations are interstate in character and are subject to regulation by the federal government as an interstate common carrier. The gross income of plaintiff for 1951 was \$9,818,363, and the net profit was \$135,941. The income from the carriage of passengers, mail, freight, express, excess baggage, chartered planes, and miscellaneous sources is set forth in the record by stipulation. Plaintiff pays for depot rental space at Omaha in the amount of \$22,000 a year, and a tax of $2\frac{1}{2}$ cents a gallon on gasoline used which amounted to \$14,180 in 1951. The tax levied in 1950 was \$4,280.44, and in 1951 it was \$4,518.29.

The formula for the assessment of the tax on flight equipment, defined in the statute as aircraft fully equipped for flight and used within the continental limits of the United States, is set forth in section 77-1245, R. R. S. 1943, as follows: "Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled

by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period." It is the contention of the plaintiff that the taxing of its flight equipment is prohibited by the Commerce Clause in any amount whatsoever. The question to be determined, therefore, is whether or not the levy of any ad valorem personal property tax on the flight equipment of the defendant on an allocation basis contravenes the Commerce Clause of the Constitution of the United States.

In *Northwest Airlines, Inc., v. Minnesota*, 322 U. S. 292, 64 S. Ct. 950, 88 L. Ed. 1283, 153 A. L. R. 245, the court dealt with the taxation of airplanes by the State of Minnesota which were engaged in interstate commerce. The plaintiff was a Minnesota corporation, its principal place of business was in St. Paul, Minnesota, and the latter city was the home port of all its planes. All of its planes were continuously engaged in flying from state to state as interstate carriers except when laid up for repairs. The taxing authorities of Minnesota assessed a tax on the full value of the entire fleet of planes belonging to the plaintiff which came into the state. In upholding the tax on the full value of all of the planes of Northwest Airlines in Minnesota, the court said: "Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal

place of business is in St. Paul and that St. Paul is the 'home port' of all its planes. The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. See *State Tax Comm'n v. Aldrich*, 316 U. S. 174, 180. No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature and the practical consequences of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other State." In so holding the court specifically stated that the taxability of any part of this fleet by any other state than Minnesota, in view of the taxability of the entire fleet by that state, was not before, or decided by the court. It was on this latter point that differences arose over the proper disposition of the case. Interstate commerce may be required, of course, to pay its fair share of the property tax burden which the states, in which the interstate business is done, may lawfully impose generally on property located in them. In other words, interstate commerce bears no undue part of the burden if the personal property tax imposed by a given state is exclusive of all other property taxes assessed by other states, or, what is more material to the case before us, if the tax on its personal property regularly used over fixed routes in interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state. The failure of the court in the Northwest Airlines case to decide whether or not the factors set forth, which permitted full taxation in Minnesota, had the corresponding effect of preventing any taxation in any other state where interstate business was transacted by Northwest Airlines by means of the fleet of planes there involved, was the cause of the major division

of the court on the issues involved. The majority to be consistent would necessarily be required to deny the right of taxation to other states in which Northwest Airlines planes engage in interstate business, or depart from the court's numerous holdings that multiple taxation of property used in interstate commerce constitutes an unlawful burden thereof in compelling the carrier to pay the taxing state more than its fair share of taxes measured by the full value of the property. It is axiomatic, we think, that if one state may properly tax the full value of the property other taxes levied by other states would be a multiple taxation of the property constituting an unconstitutional burden upon interstate commerce.

The essential facts in the present case do not bring it within any announced rule that would permit any one state to levy an ad valorem personal property tax for the full value of the planes involved. In the present case the corporation domicile is in Delaware, its general offices in Texas, and the home port of the planes in Minnesota. Under such a division of the factors announced and considered in the Northwest Airlines case we cannot say that the fleet of planes in the case at bar has any taxable situs in any one state where the full value of such planes could be taxed. Under such a situation we think the Northwest Airlines case leaves the door open for a decision on the issue as to whether or not, in a case such as we have here in which no state has a right to tax the fleet at full value, each state through which the planes land and engage in interstate business may tax a part of their value, if it is fairly related to their use within the taxing state. The over-all result of the Northwest Airlines case is that where the owner of a fleet of airplanes engaged in interstate commerce is a corporation of the state levying the tax with its principal place of business and the home port of all its planes within the same state, such state may tax the full value of the planes. Whether or not the taxing of the whole value in such state operated to exempt them from taxation in other states in which they engage in interstate business is specifically reserved by the opinion and casts serious doubt on the right of other states to do

so unless, possibly, evidence of a tax situs in other states would have called for a different result; in any event, the authority of Minnesota to tax the full value of the fleet of planes rests upon the express presumption that in flying in interstate commerce on regular schedules through several states they had not acquired a permanent taxable status elsewhere, although some of them had actually been taxed in other states. Whether this means the result would have been different if it had been shown that there was a taxable situs in other states or, whether it means that multiple taxation of tangible property is to be allowed even though the aggregate assessment exceeds the full value of the property, remains unanswered. We assume the former, in view of the many holdings of the United States Supreme Court relative to multiple assessments in interstate commerce which exceed the full value of the property as being an undue burden under the Commerce Clause.

In the later case of *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585, the court sustained an apportioned ad valorem personal tax levy by the nondomiciliary state of Louisiana upon a fleet of vessels engaged in interstate commerce in inland waters. The facts show that the vessels in question came into New Orleans where they were left for unloading and reloading. They were operated on no fixed schedules but the turn-arounds were made as quickly as possible. They remained long enough to unload and take on cargo and to make necessary and temporary repairs. The State of Louisiana and the city of New Orleans levied ad valorem taxes on assessments based on the ratio between the total number of miles of lines in Louisiana and the total number of miles of all of the carrier's lines. In upholding the tax the court said: "It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders. * * * We can see no reason which should put water transportation on a different constitutional footing than other interstate enter-

prises." Paraphrasing the latter statement, "We can see no reason which should put air transportation on a different constitutional footing than other interstate enterprises."

In the subsequent case of *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427, 26 A. L. R. 2d 1371, the principle that vessels moving on inland waters in interstate commerce could be taxed by a state through which they passed on the basis of that portion of the value of the vessels represented by the ratio between the total number of miles in the taxing state and the total number of miles in the entire operation is adhered to as a proper method of tax allocation. The *Peck* case distinguishes *Northwest Airlines, Inc., v. Minnesota*, *supra*, on the basis that it was not shown in the latter case that "a defined part of the domiciliary corpus" had acquired a taxable situs elsewhere." The further statement in the *Peck* case to the effect that "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile," appears to sustain an allocation tax in a case such as we have before us in which no part of the property taxed was in the domiciliary state during the tax year. The holding in the *Northwest Airlines* case that the tax in that case on the full value of the air fleet was valid is based on a premise that is wholly absent in the present one.

The case relied upon the most to sustain the allocation theory of taxing personal property used in interstate commerce is *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613. It involved a tax on Pullman cars that were continuously moving in and out of the State of Pennsylvania. The fundamental concepts which support the allocation theory of taxing personal property used in interstate commerce are set forth in this case. The legal fiction that all personal property has its situs at the owner's domicile is abandoned and the system of taxing it at the place at which it is used and by whose laws it is protected when it is employed in a business requiring continuous and constant movement from one state to another, is plainly and definitely announced. That this

case is relied upon in the Ott and Peck cases is clear. For reasons stated in the Pullman's Palace Car Company case, we think the inland water transportation cases are particularly applicable. The court in the Pullman case said: "No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse." Air transportation likewise requires no artificial roadways other than port facilities. The rule as to one would appear to be fully applicable to the other.

The plaintiff relies primarily upon the following cases to sustain its position. *Gibbons v. Ogden*, 9 Wheaton 1, 6 L. Ed. 23; *Smith v. Turner*, 7 Howard 282, 12 L. Ed. 702; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; *New York Central & H. R. R. Co. v. Miller*, 202 U. S. 584, 26 S. Ct. 714, 50 L. Ed. 1155; *Union Tank Car Co. v. McKnight*, 84 F. 2d 421; *Spector Motor Service, Inc., v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238; *City of Chicago v. Willett Co.*, 344 U. S. 574, 73 S. Ct. 460, 97 L. Ed. 333. We do not consider these cases controlling in the issue before us. A careful reading of some of them, however, indicates that they support the theory of the defendant. Some announce principles which have been abandoned in the natural course of change in our economic and transportation systems. Others are based on facts which clearly distinguish them from the present case while others involve a tax in no way resembling an ad valorem tax on personal property. The plaintiff also cites *Pullman's Palace Car Co. v. Pennsylvania*, *supra*, *Ott v. Mississippi Valley Barge Line Co.*, *supra*, *Northwest Airlines, Inc., v. Minnesota*, *supra*, and *Standard Oil Co. v. Peck*, *supra*, which in our opinion definitely sustain the position of the defendant as we have heretofore stated.

It seems clear, therefore, that Nebraska and other similarly situated states have the power to impose an apportioned ad valorem personal property tax upon the flight equipment of this plaintiff, which is engaged in interstate commerce within the taxing state, when it has been wholly and continuously outside the state of the owner's domicile and the assessed value of the property bears a fair and reasonable relation to the use made of it in such taxing state.

The petition alleges also that the statutes in question are unconstitutional in that they violate Article I, Section 9, clause 6, and Article I, Section 10, clause 3, of the Constitution of the United States. These questions appear to have been abandoned in the brief and oral argument. We hold, however, that the foregoing constitutional provisions were not violated on the basis of the authorities cited dealing with the alleged violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

The foregoing disposes of the only question raised by the petition. Plaintiff in its brief states: "Plaintiff contends such taxation by defendants is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, which vests in Congress the exclusive right to regulate commerce among the states, and the levy of such tax by the defendants constitutes regulation. No state constitutional question or other legal issue is presented for the Court's decision." We consequently limit the issue strictly to that raised by the petition. The plaintiff does not allege that the formula set forth in the statute produces an assessed value that does not bear a fair and reasonable relation to the use of the property within this state. That issue was not alleged, briefed, or argued by the plaintiff. We do not deem this issue to be before the court for its determination.

We find that the act is not violative of Article I, Section 8, Clause 3, Article I, Section 9, Clause 6, or Article I, Section 10, Clause 3, of the Constitution of the United States, on the basis on which it is here challenged. The petition of the plaintiff is therefore dismissed.

Dismissed.

APPENDIX "B"

PERTINENT SECTIONS OF THE STATE STATUTES INVOLVED

CHAPTER 77

REVENUE AND TAXATION

RSN 1943, Reissue of 1950

77-1244. *Personal Property; taxation of air transportation carriers; definitions.* As used in sections 77-1244 to 77-1246:

(1) The term "air carrier" means any person, firm, partnership, corporation, association, trustee, receiver or assignee, and all other persons, whether or not in a representative capacity, undertaking to engage in the carriage of persons or cargo for hire by aircraft; any air carrier as herein defined, engaging solely in intrastate transportation, whose flight equipment is based at only one airport within the state, shall be excepted from taxation under this section, but shall be subject to taxation in the same manner as other locally assessed property;

(2) The term "aircraft arrivals and departures" means (a) the number of scheduled landings and takeoffs of the aircraft of an air carrier, (b) the number of scheduled air pickups and deliveries by the aircraft of such carrier, and (c) in the case of nonscheduled operations, shall include all landings and takeoffs, pickups and deliveries;

(3) The term "flight equipment" means aircraft fully equipped for flight and used within the continental limits of the United States.

(4) The term "originating revenue" means revenue to an air carrier from the transportation of revenue passengers and revenue cargo exclusive of the revenue derived from the transportation of express or mail; and

(5) The term "revenue tons handled" by an air carrier means the weight in tons of revenue

passengers and revenue cargo received and discharged as originating or terminating traffic.

Source: Laws 1947, c. 266, §1, p. 858; Laws 1949, c. 231, § 5, p. 641.

77-1245. *Personal property; taxation of air transportation carriers; assessment; collection.* Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period.

Source: Laws 1947, c. 266, §2, p. 859.

77-1246. *Personal property; taxation of air transportation; laws applicable.* Real property and personal property, except flight equipment, of an air carrier shall be taxed in accordance with the applicable laws of this state.

Source: Laws 1947, c. 266, § 3, p. 860.

77-1247. *Personal property; taxation of air transportation carriers; annual report; contents.* Each air carrier, as defined in section 77-1244, shall on or before June 1 in each year make to the Tax Commissioner, containing the information necessary to determine the value of its flight equipment and the proportion allocated to this state for purposes of taxation.

Source: Laws 1949, c. 231, § 1, p. 641.

77-1248. *Personal property; taxation of air transportation carriers; Tax Commissioner; report to State Board of Equalization and Assessment.* The Tax Commissioner shall ascertain from the reports made, and from any other information obtained by him, the value of flight equipment of air carriers and the proportion allocated to this state for the purposes of taxation, as provided in section 77-1245, and shall make a report thereof to the State Board of Equalization and Assessment as to each air carrier.

Source: Laws 1949, c. 231, § 2, p. 641.

77-1249. *Personal property; taxation of air transportation carriers; State Board of Equalization and Assessment; levy.* The State Board of Equalization and Assessment shall each year make a levy for purposes of taxation against the value so ascertained and determined by the Tax Commissioner, as provided in section 77-1248, at a rate which shall be equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.

Source: Laws 1949, c. 231, § 3, p. 641.

77-1250. *Personal property; taxation of air transportation carriers; levy; collection; payment.* When levied, the tax shall be collected and paid in the same manner as the tax on car companies as provided in sections 77-629 to 77-631.

Source: Laws 1949, c. 231, § 4, p. 641.

APPENDIX "C"

STIPULATION OF FACTS—Filed February 26, 1953
IN THE SUPREME COURT OF NEBRASKA
General Number 33260

MID-CONTINENT AIRLINES, INC., a Corporation, *Plaintiff*,

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT,
et al., *Defendants*

1. Plaintiff is a corporation, organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in said state. The principal object of its incorporation was and is the owning and operating of airplanes as carriers by air of persons and property for hire. From other states it operates its planes for such purposes on regularly scheduled stops in and out of the State of Nebraska. All its planes are fully equipped for flight through the air and are designed and constructed to descend from the air above to an airport built for the landing and taking off of such aircraft. Two such landing fields have been provided for such purpose in Nebraska, one by the municipality of Omaha, and one by the municipality of Lincoln. At these airfields plaintiff neither owns nor maintains hangars for reconditioning, overhauling, repairing, or storing aircraft, its engines, or any of its flight equipment.

2. Plaintiff's principal activities in Nebraska consist of descending from the air above the state to unload persons and property from other states and

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promptly load persons and property in the same aircraft at the Omaha airport and ascend into the air and continue the scheduled flight through the air to the scheduled destinations in other states. There are fourteen of such flights in and out of Omaha each day. Plaintiff's aircraft move in a continuous circuit, so to speak, with planes moving in and out of the circuit from the overhaul base in Minnesota, there being constantly in use in the circuit all of plaintiff's aircraft which are not at the overhaul base; notwithstanding the fact that a particular plane may, during the course of its flight in the circuit, be given one or more flight numbers and thus a given flight be spoken of as originating and terminating at specified cities.

3. Since July 15, 1951, the plaintiff has been authorized by the Civil Aeronautics Administration of the United States, for a trial period of three years, to land at the airport at Lincoln, Nebraska, on two south-bound flights through Omaha while en route to Missouri and points beyond, and on two flights from Missouri while en route to Omaha and points in other states to the north. Consequently, persons and property may be loaded on such flights at Omaha for Lincoln and at Lincoln for Omaha.

4. Mid-Continent Airlines and Braniff Airways, Incorporated, which were consolidated effective about August 1, 1952, operate 7,336 unduplicated route miles over the air lanes, serving sixty communities in the United States plus Latin American and Mexican routes.

5. The plaintiff operates fourteen flights through Omaha, Nebraska, as above stated, as follows:

MID-CONTINENT AIRLINES, INCORPORATED

FLIGHT DATA

Listed below are all the scheduled flights of Mid-Continent Airlines as operated through Omaha, Nebraska. This data gives the originating station of each flight and the arrival and departure times into and out of Omaha, Nebraska, showing the next scheduled stop beyond Omaha, Nebraska:

These flights are separated into southbound and northbound flights.

SOUTHBOUND

Flight Number

23 Originates in Omaha, Nebraska, 7:00 am, arriving in Lincoln, Nebraska, 7:27 am, flying non-stop to St. Joseph, Missouri, then to Kansas City, Missouri and St. Louis, Missouri. Equipment used on this flight leaves Minneapolis/St. Paul, Minnesota, 7:00 pm the evening before and arrives in Omaha, Nebraska, 9:55 pm, after scheduled stops in Sioux Falls, South Dakota and Sioux City, Iowa.

395 Originates in Minneapolis/St. Paul, Minnesota, 7:25 am, making scheduled stops at Sioux Falls, South Dakota and Sioux City, Iowa, arriving in Omaha, Nebraska at 9:47

Flight Number

am. This flight leaves Omaha 10:07 am, flying non-stop to Kansas City, Missouri, then to Tulsa, Oklahoma, and Houston, Texas.

39 Originates in Minneapolis/St. Paul, Minnesota, 11:30 am, with scheduled stops in

Sioux Falls, South Dakota and Sioux City, Iowa, and arrives in Omaha, Nebraska, 2:25 pm. This flight leaves Omaha 2:40 pm, flying non-stop to St. Joseph, Missouri and then to Kansas City, Missouri.

97 Originates in Minneapolis/St. Paul, Minnesota, 2:30 pm, flying non-stop to Omaha, Nebraska, arriving 4:14 pm. This flight leaves Omaha 4:29 pm, flying non-stop to Kansas City, Missouri and to Houston, Texas.

9 Originates in Minneapolis/St. Paul, 4:15 pm, with scheduled stops at Watertown, Huron, and Sioux Falls, South Dakota; and Sioux City, Iowa, and arrives in Omaha, Nebraska, 8:37 pm. This flight departs from Omaha 8:52 pm and arrives in Lincoln, Nebraska, 9:19 pm, leaving Lincoln, 9:24 pm, flying non-stop to Kansas City, Missouri.

319 Originates in Minneapolis/St. Paul, 8:50 pm, flying non-stop to Omaha, Nebraska, arriving 10:09 pm. This flight leaves Omaha 10:09 pm, flying non-stop to Kansas City, Missouri.

NORTHBOUND

16 Originates in Kansas City, Missouri, 7:40 am, flying non-stop to Omaha, Nebraska, arriving 8:45 am. This flight leaves Omaha 9:00 am, flies non-stop to Sioux City, Iowa, and then to Sioux Falls, Huron and Watertown, South Dakota; and terminates in Minneapolis/St. Paul, Minnesota.

18 Originates in Kansas City, Missouri, 9:15 am, flying non-stop to Omaha, Nebraska, arriving in Omaha 10:20 am. This flight leaves Omaha 10:35 am, flying non-stop to Minneapolis/St. Paul, Minnesota.

- 4 Originates in Kansas City, Missouri, 12:15 pm, stopping in St. Joseph, Missouri, arriving in Lincoln, Nebraska, 1:36 pm. This flight leaves Lincoln 1:41 pm, arriving in Omaha 2:08 pm. This flight leaves Omaha 2:23 pm, flying non-stop to Sioux City, Iowa.
- 302 Originates in Kansas City, Missouri, 2:45 pm, flying non-stop to Omaha, arriving 3:35 pm. This flight leaves Omaha, 3:50 pm and flies non-stop to Minneapolis/St. Paul, Minnesota.
- 38 Originates in St. Louis, Missouri, 3:30 pm after stopping in Kansas City, Missouri and St. Joseph, Missouri, it arrives in Lincoln, Nebraska 6:41 pm. This flight leaves Lincoln 6:46 pm, and arrives in Omaha, 7:13 pm. This flight leaves Omaha 7:28 pm, flies non-stop to Sioux City, Iowa and then to Sioux Falls, South Dakota, and Minneapolis/St. Paul, Minnesota.
- 300 Originates in Kansas City, Missouri, 5:30 pm, and flies non-stop to Omaha, Nebraska, arriving 6:20 pm. This flight leaves Omaha, Nebraska 6:40 pm, flying non-stop to Minneapolis/St. Paul, Minnesota.
- 322 Originates in Kansas City, Missouri, 9:45 pm, flying non-stop to Omaha, Nebraska, arriving 10:35 pm. This flight leaves Omaha, 10:55 pm, flying non-stop to Sioux City, Iowa and Sioux Falls, South Dakota and then on to Minneapolis/St. Paul, Minnesota.

Daily Aircraft Time in Nebraska as Compared
with Total System Aircraft Time
Nebraska Time

	Flight No.	Air	Ground	Total
1. Southbound	23	1:09	:05	1:14
2.	395		:20	:20
3.	39		:15	:15
4.	97		:15	:15
5.	9	1:09	:20	1:29
6.	319		:20	:20
7.	7		9:05	9:05
8. Northbound	16		:15	:15
9.	18		:15	:15
10.	4	1:09	:20	1:29
11.	302		:20	:20
12.	38	1:09	:20	1:29
13.	300		:20	:20
14.	322		:20	:20

Total	4:36	12:50	17:26
-------	------	-------	-------

System Total (27 x 24:00)	648:00
------------------------------	--------

Ratio—Nebraska to System	2.70%
--------------------------	-------

Eight aircraft operate the above
schedules in normal rotation.

6. Miles traveled by passengers originating and terminating in Nebraska compared with system passenger miles—July 15, 1951, to January 31, 1952:

Passenger Miles of Passengers Originat- ing and Terminating in Nebraska	Passenger Miles Mid-Continent System	Ratio of Nebraska to System
--	--	--------------------------------

39,215	84,605,029	.046%
--------	------------	-------

7. Revenue derived from passengers originating and terminating in Nebraska as compared with system passenger revenue—July 15, 1951, to January 31, 1952:

Passenger Revenue of Passengers Originat- ing and Terminating in Nebraska	Passenger Revenue Mid-Continent System	Ratio of Within Nebras- ka Income to System Income
\$2,404.68	\$4,750,440.09	.051%

8. The mileage is ninety miles from Lincoln, Nebraska, to the state's border near Rulo, Nebraska, and it takes forty-two minutes to fly that distance. There are four such flights daily. Most of the flights, being those in and out of Omaha, Nebraska, take off and enter the state in a matter of seconds because the Omaha airport adjoins the Missouri River, which is the state boundary, and the flights come over the river and go out over the river to and from other states, except the flights above described to Lincoln since July 15, 1951. Each aircraft is on the ground at the airport to load and unload passengers and freight from five to twenty minutes, except the one flight per day leaving Minneapolis at 7:00 p. m., arriving in Omaha at 9:55 p. m., leaving Omaha at 7:00 a. m., arriving in Lincoln at 7:27 a. m., and from there the plane goes to points in Missouri and south in interstate commerce.

Summary of Carriage of Persons and Property
between Lincoln and Omaha, Nebraska
July 15, 1951, to January 31, 1952

	Mail Pounds	Express Pounds	Freight Pounds	Number of Passengers
In Nebraska	11,906	5,319	4,864	713
System total	2,084,447	1,362,379	1,946,824	263,075
Ratio	.571%	.390%	.250%	.271%

9. Plaintiff's main executive offices were in Kansas City, Missouri, and are now in Dallas, Texas, owing

to a consolidation of Mid-Continent Airlines, Inc., with Braniff Airways, Incorporated, which took place on or about August 1, 1952. Braniff Airways is a corporation organized and existing under the laws of the State of Oklahoma with its corporate place of business at Oklahoma City in said state and with its main executive offices at Dallas, Texas, and is organized for the same objects and purposes as plaintiff. Accordingly, the caption in this cause shall be "Mid-Continent Airlines, Inc., now Braniff Airways, Incorporated," versus the defendants named. The defendants as named in the caption are the proper party defendants in this action.

10. The home port of plaintiff is and at all times mentioned herein has been at the Minneapolis-St. Paul airport, known as the Wold-Chamberlain Air Field, where plaintiff maintains repair shops, machinery, equipment, and hangars. To this port each of the aircraft, with all its flight equipment that alights from the air above Nebraska and ascends into the air from Nebraska, must be flown at designated times for governmental inspection, repairs, maintenance, tests, overhauling, and storage when not in use. None of such home port facilities were or are located in Nebraska. All aircraft of plaintiff must be returned to said home port at Minneapolis-St. Paul for governmental inspection and overhauling and relicensing before a period of fifty hours has expired on the engines and plane under the Civil Aeronautics Administration rules, under the authority of the Civil Aeronautics Code (49 U.S.C.A. Ch. 9, §§ 401-705).

11. The plaintiff's aircraft are flown through the air within the limits of aerial highways, specifically de-

scribed and assigned by the United States Civil Aeronautics Administration to the plaintiff. Said aerial space is so described and outlined by said Administration as the fixed air lanes in which plaintiff's ships are required to fly when going from state to state into and from Nebraska. Said Administration issues, upon examination, the licenses for the aircraft, its engines, propellers, and all its flight equipment, including radio and all communication devices from and to the aircraft. Likewise, the Administration licenses the pilots and all personnel engaged in flight. All aircraft, engines, radio, communication apparatus, and flight equipment must fly to the Minneapolis-St. Paul home port of plaintiff, where all are located.

12. At the Omaha Municipal Airport the federal government, acting through said Administration, has constructed and maintains an airport traffic control tower at which there is stationed a chief airport controller and eleven assistants, all of whom are employed and paid by the United States at a payroll expense of about \$50,000 per year. This personnel and the equipment used are so stationed for the purpose of directing and controlling aircraft coming into or departing from the Omaha airport. Each aircraft of plaintiff coming into the airport receives, when about ten minutes out from Omaha, preliminary landing instructions, and is told by the government controller which landing runway to use and is given the traffic pattern, or may be instructed not to land. These government aircraft controllers at the Omaha airport are likewise in constant communication with other major aircraft control towers spaced throughout the parts of the United States

directing flight in the air lanes through which plaintiff's planes are licensed and restricted to fly and from which they may descend and ascend in pursuance of their government licensed course and government approved schedules. These federal air lanes are laid out across the country and normally connect major air terminals. These air lanes are approximately ten miles wide and are established north, south, east, and west. Each air carrier has been granted certain priority authority. Radio facilities are provided by the government along these air lanes to direct all air traffic from one point to another. For planes not equipped with radio, the government provides and operates a radio beam. Also about each twenty miles on the ground are electrically operated beacons indicating that the designated air lane is above that light.

13. All violations of rules and regulations of the Civil Aeronautics Administration or of the Civil Aeronautics Code may be reported to the Administration by any person concerned. Violations of landing and take-off regulations at an airport in Nebraska or elsewhere are by law federal offenses under the Civil Aeronautics Code. Such violations are punishable as by the law provided in the federal courts (49 U. S. C. A. §§ 560, 610 (a), 623; 61.306, 60.18(c) of Civil Air Regulations).

14. The plaintiff's aircraft, which land from the air lanes above and take off into them from the Nebraska airports, are each engaged as federally licensed air carriers of mail, persons, and property between the States of North Dakota, Minnesota, South Dakota, Iowa, Wisconsin, Illinois, Nebraska, Colorado, Missouri, Okla-

homa, Arkansas, Tennessee, Louisiana, Texas, and now Mexico and South America.

15. At the close of the year 1951 the total operating revenue of plaintiff (Mid-Continent) was \$9,818,363. Total operating expense was \$9,508,859. Net profit after taxes was \$135,941. The revenue miles flown were 9,556,459. The revenue passengers carried were 441,115. The pounds of mail and cargo carried were 10,200,000.

16. The gross income from passengers for 1951 was \$7,681,760.80; from mail, \$1,608,590.65; from freight, express, and excess baggage, \$331,261.23; from chartered planes and other transportation, \$171,037.96; and from miscellaneous sources, \$25,712.68. Total for 1951, \$9,818,363.32.

17. Capitalization (Mid-Continent): Common stock issued and outstanding, 418,755 shares par value \$1.00; debentures due May 1, 1954, \$50,000; May 1, 1959, \$100,000; May 1, 1962, \$150,000; May 1, 1963, \$1,000,000.

18. Plaintiff pays approximately \$22,000 per year for depot rental space, landing fees, and other facilities at the Municipal Airport in Omaha.

19. In addition to the \$22,000 per year, the plaintiff pays two and a half cents per gallon tax on gasoline fuel supplied to its aircraft at Omaha. In 1951, 567,000 gallons were taken on in Omaha, resulting in a net tax to the State of Nebraska of \$14,180.00.

20. The personal property of plaintiff, such as office furniture and equipment, auto trucks, and all similar property, is taxed in Douglas County. Also such property would be taxed in Lancaster County, if any

such property is there located. In Douglas County this tax is \$200 to \$300 per year. Comparable amounts are paid in other municipalities in other states where the aircraft land and take off.

21. In a return made by plaintiff to the defendant Board for taxation for 1950, 9% of the total was given as the proper per cent of revenue originating in Nebraska based on ticket sales, and 11½% of the total system tonnage originated in Nebraska for 1950.

22. The plaintiff made out and filed its return under forms furnished by the defendant Tax Commissioner for 1950, and the assessment was as follows. The Mid-Continent Airlines assessment for 1950 was compiled by the defendant Tax Commissioner from forms filled out, signed, and returned by the plaintiff. The tax for 1950 was \$4,280.44, and it remains unpaid. The defendants fixed as the valuation figure \$118,901.00 for plaintiff's flight equipment for Nebraska. The rate of levy was 36 mills, resulting in the tax of \$4,280.44 for 1950. The valuation was determined by the Tax Commissioner as follows:

Airline Assessments 1950

MID CONTINENT AIRLINES

1. System Value Formula

A. Five Year Average Net Operating Income

Capitalized at 6%	\$5,484,350
-------------------	-------------

B. Five Year Ave. Mkt. Value of Stocks and Bonds

	3,927,634
--	-----------

C. Book Value Depreciated Cost Basis	707,864	
Average of A, B and C or System Value		3,373,283
2. Flight Equipment Apportionment Formula		
A. Ratio of Flight Equipment Cost (Sec. B) to Total Operating Property Cost (Sec. F)	1,771,360	61.1%
	<u>2,899,660</u>	
B. Ratio of Depreciated Cost Value of Flight Equipment (Sec. C) to Depreciated Cost Value of Total Operating Property (Sec. F)	237,322	33.5%
	<u>707,864</u>	
Average of A and B or Apportionment Factor		47.3%
3. Allocation Formula		
A. Ratio of Arrivals and Departures within Nebraska to Total Arrivals and Departures	10,306	9.032
	<u>114,104</u>	
B. Ratio of Revenue Tons Handled in Nebraska to Total Revenue Tons Handled	8,008	11.541
	<u>69,389</u>	
C. Ratio of Revenue Originating within Nebraska to Total Revenue	537,894	9.235
	<u>5,824,803</u>	
Average of A, B and C or Allocation Factor		9.936

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4. Allocated Value (Result of System Value x Apportionment Factor x Allocation Factor $3,373,283 \times 47.3 = 1,595,563 \times 9.936 = \$158,535$)

5. Equalized value

$\$158,535 \times 75\% = \$118,901$

23. For the year 1951 the plaintiff failed to file the return, and defendants accordingly used the same ratio formulae for 1951 as returned for 1950, changing only the mill levy from 36 to 38, which was the average levy throughout the whole state for 1951. The mill levy is obtained by the defendants' computing the total amount of property taxes levied in the state and dividing that total by the total assessed valuation of property for the state, and that resulted in the mill levy of 36 and 38, respectively, for 1950 and 1951. For the year 1951 the tax assessed was \$4,518.29, which remains unpaid. These taxes are drawing interest and penalties as by law provided.

24. The tax in question is assessed only against regularly scheduled air carriers upon their flight equipment, which is the fully equipped airplane, operating from without the State of Nebraska and into and out of Nebraska, and is not applied to carriers who operate only intermittently in the State of Nebraska in flights from and back to a fixed base in Nebraska. Such planes are assessed by the local county assessors in the county in which the base is located.

25. The State Tax Commissioner, in assessing plaintiff's aircraft and arriving at the ratios and the resulting tax, followed the state statutes which the Attorney General advised were applicable, and used the unit rule to arrive at the whole system value, and then used the statutory ratios to determine the valuations

for Nebraska. It is these sections of the Nebraska law that are now under attack as unconstitutional under the Federal Constitution, as set forth in the petition on file herein. The defendants' position is made clear by their answer on file herein. The taxing statutes in question are copied herein as follows:

26. The tax collected from air carriers flying in and out of Nebraska under the act is used for the general expenditures of the state. In making the levy based upon the valuations and ratios above set forth, no ratio is determined by the defendants of intrastate to interstate business carried on by the plaintiff in Nebraska.

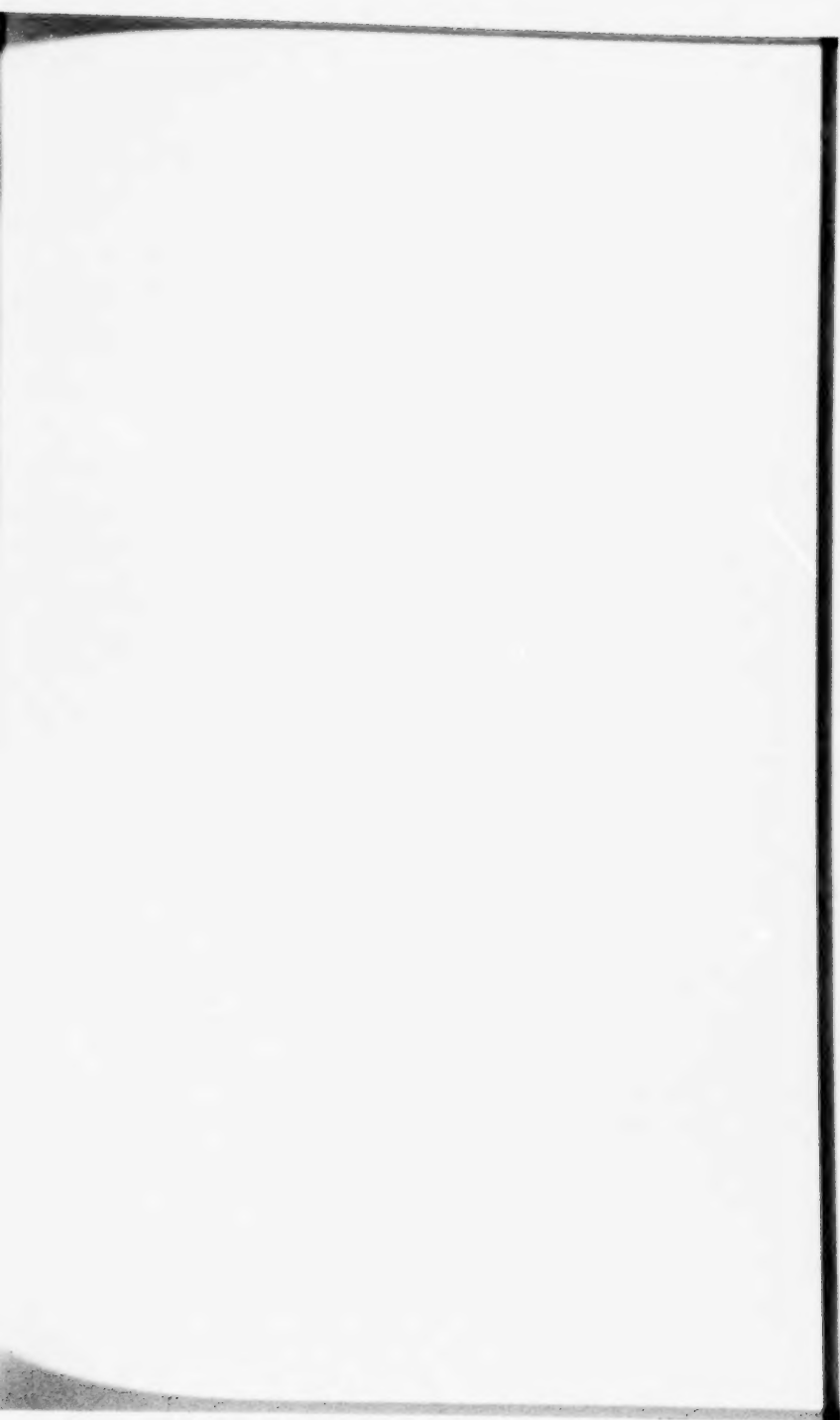
27. The rate of tax levy imposed upon plaintiff's flight equipment, pursuant to the legislative enactment here in question, is equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.

Dated at Omaha, Nebraska, February 24, 1953.

Mid-Continent Airlines, Inc.,
a Corporation, *Plaintiff*,
By /s/ Wm. J. Hotz
Of Hotz & Hotz,
1530-5 City National Bank Building,
Omaha 2, Nebraska,
Its Attorneys.

Dated at Lincoln, Nebraska, February 26, 1953.

Nebraska State Board of Equalization
and Assessment, et al., *Defendants*,
By CLARENCE S. BECK,
Attorney General,
By /s/ C. C. SHELDON,
Assistant Attorney General.



MAR 2 1954

HAROLD B. WILLEY, Clerk

**In The
SUPREME COURT OF THE UNITED STATES**

—::—
October Term, 1953

No. 476.
—::—

**BRANIFF AIRWAYS, INCORPORATED, APPELLANT,
V.**

**NEBRASKA STATE BOARD OF EQUALIZATION
AND ASSESSMENT, ET AL., APPELLEES.**
—::—

**APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEBRASKA.**
—::—

BRIEF OF APPELLEE.
—::—

CLARENCE S. BECK,
Attorney General,
C. C. SHELDON,
Assistant Attorney General,
of Lincoln, Nebraska,
Counsel for Appellee.

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In The
SUPREME COURT OF THE UNITED STATES

—:—
October Term, 1953

No. 476.

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BRANIFF AIRWAYS, INCORPORATED, APPELLANT,
V.

NEBRASKA STATE BOARD OF EQUALIZATION
AND ASSESSMENT, ET AL., APPELLEES.

—:—
APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEBRASKA.

—:—
BRIEF OF APPELLEE.

—:—
OPINION BELOW.

The sole opinion below is that of the Nebraska Supreme Court, entitled *Mid-Continent Airlines, Inc., now Braniff Airways Incorporated v. Nebraska State Board of Equalization and Assessment, et al.*; which is officially reported 157 Neb. 425, 59 N. W. (2d) 746. Probable jurisdiction was noted by the Court on January 4, 1954.

JURISDICTION.

Jurisdiction of this Court has been invoked under the provisions of Title 28, U. S. C. #1257(2). The appellees have made no effort to, and do not now, resist jurisdiction, except to such extent as our Point V herein might be regarded as resistance of jurisdiction.

QUESTION PRESENTED.

The basic question presented for determination by this Court is whether the Nebraska taxing statute (Sections 77-1244 through 1250, Reissue, Revised Statutes of Nebraska, 1943, appearing at page 20 of the Record and also in App. B of Brief of the Appellant) is violative of Article I, Section 8, Clause 3 of the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

It is the position of the appellees that the Nebraska statute here under question and Article I, Section 8, Clause 3 of the Constitution of the United States, are the only provisions here involved. Appellant, however, states that also involved are the Civil Aeronautics Code and Article I, Section 9, Clause 5 and Section 10, Clauses 2 and 3 of the Constitution.

STATEMENT OF THE CASE.

This litigation was commenced by the appellant as plaintiff in an original action for declaratory judgment before the Nebraska Supreme Court. The matter was presented to the Nebraska Court, as here, on the basis

of a stipulation of agreed facts. The Nebraska Court upheld the statute involved and dismissed the petition. The matter now comes before this Court as an appeal from the judgment of the Nebraska Court.

STATEMENT OF THE FACTS.

The facts upon the basis of which this cause is presented are contained in the comparatively brief Stipulation of Facts (R. 10, also appearing in Brief of the Appellant, App. C).

We accept the Epitomization of Stipulation of Facts, set forth at page 14, et seq., of the Brief of the Appellant, as being a fair summary of the stipulation, except for the argumentative aspects of numbered paragraphs 13, 26 and 27 of such epitomization.

SUMMARY OF ARGUMENT.

Point I—Airplanes equipped for flight, moving from the state in which the owner has its operating base, which state is neither the principal place of business of the owner nor the state of its incorporation, in a continuous circuit of interstate transportation, over fixed routes and according to regular schedules, within and through a group of states, of which Nebraska is one, acquire a tax situs in Nebraska such as will support the imposition of an apportioned ad valorem property tax upon a proportionate part of the value of such airplanes fairly related to their use within the State of Nebraska.

Point II—Pre-emption of the field of air commerce by Congress does not prohibit the imposition of fair

and reasonable state ad valorem property taxes upon flight equipment employed in interstate commerce within the taxing state.

Point III—A state ad valorem property tax upon vehicles of interstate commerce, apportioned according to use within the taxing state, does not constitute an impost or duty within the meaning of Article I, Section 9, Clause 5 or Section 10, Clause 2 of the Constitution; nor does such a tax constitute tonnage duty within the meaning of Article I, Section 10, Clause 3 of the Constitution.

Point IV—This Court will indulge every presumption in favor of a state's right to tax and will interfere only when a clear and demonstrated usurpation of power exists.

Point V—In a situation involving situs for the imposition of a state apportioned ad valorem property tax upon vehicles engaged in interstate commerce, wherein representatives of the taxing authority have stated that the statute in question covers an average portion of the property within the state throughout the taxing year, a claim that the property acquired no situs for taxation within such state will be of no avail in the absence of any showing of a lack of administrative or judicial remedy for correcting errors of assessment within the state.

ARGUMENT.

Point I.

Airplanes Equipped for Flight, Moving from the State in Which the Owner Has Its Operating Base, Which State Is Neither the Principal Place of Business of the Owner Nor the State of Its Incorporation, in a Continuous Circuit of Interstate Transportation, Over Fixed Routes and According to Regular Schedules, Within and Through a Group of States, of Which Nebraska Is One, Acquire a Tax Situs in Nebraska Such as Will Support the Imposition of an Apportioned Ad Valorem Property Tax Upon a Proportionate Part of the Value of Such Airplanes Fairly Related to Their Use Within the State of Nebraska.

NORTHWEST AIRLINES, INC. V. STATE OF MINNESOTA,

To date, the only decision of this Court involving the taxation of flight equipment engaged in interstate air commerce is that of *Northwest Airlines v. State of Minnesota*, 322 U. S. 292, 88 L. Ed. 956, 64 S. Ct. 950. Although somewhat distinguishable in its facts from the case now before the Court, the issues involved and the concepts enunciated by the Court in that case are such as to make appropriate a rather detailed consideration of the case. Seldom will there be found a reported case the analysis of which is more challenging.

The conclusion and judgment of the court was announced in an opinion written by Mr. Justice Frankfurter, speaking for himself and Mr. Justice Douglas and Mr. Justice Murphy. Mr. Justice Black and Mr. Justice Jackson concurred in the judgment of the court,

but each wrote separate concurring opinions in order to express views at variance with, or not contained in, the opinion announcing the decision. Mr. Chief Justice Stone wrote a dissenting opinion, in which he was joined by Mr. Justice Roberts, Mr. Justice Reed and Mr. Justice Rutledge.

As was pointed out by Justice Black in his concurring opinion, the differing views of the members of the Court illustrate the inherent difficulties encountered in the judicial formulation of general rules to meet the national problems arising from state taxation which bears upon interstate commerce.

The following facts may be ascertained from the opinions in the *Northwest Airlines case*:

1. The owner of the fleet of airplanes upon which Minnesota imposed a full value ad valorem personal property tax was a corporation organized and existing under and by virtue of the laws of Minnesota.
2. The home port of the fleet, registered with the Civil Aeronautics Authority, was in Minnesota.
3. The principal place of business of the corporation was Minnesota.
4. None of the units of the fleet of airplanes, which were continuously engaged in interstate commerce, were outside of Minnesota at all times during the tax year.
5. That all of the flight equipment involved was continuously engaged in interstate commerce in and out of Minnesota and other states, and it

did not appear that there was some part of the equipment within Minnesota at all times throughout the year.

OPINION ANNOUNCING DECISION.

In the opinion announcing the decision of the Court, to the effect that Minnesota possessed authority to impose an ad valorem personal property tax upon the full value of all of the units of the fleet, notwithstanding the fact that some of the airplanes were not within Minnesota on assessment day, it was stated that the tax was upon property of a corporation no part of which receives permanent protection from any other state; and that, on the basis of rights which only Minnesota originates and continues to safeguard, she alone can tax property which is permanently attributable to Minnesota and no other state. It was further said in the opinion that the case was governed by the ruling in *New York ex rel. New York C. & H. R. R. Co. v. Miller*, 202 U. S. 584, 50 L. Ed. 1155, 26 S. Ct. 714, which sustained a New York tax measured by the full value of railroad rolling stock of a domestic corporation, no part of which was continuously outside of the State of New York during the tax year. Justice Frankfurter went on to say that the doctrine of apportioned taxation as applied in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150, 26 S. Ct. 36, 4 Ann. Cas. 493, is not applicable.

It is further stated, in the opinion, that the fact the Northwest Airlines may have paid taxes on some proportion of its fleet in other states does not abridge the taxing power of Minnesota; that the taxability of any part of the fleet by other states was not before the

Court; and that there had been no showing, as there had been none in the *Miller case*, that any defined part of the domiciliary corpus had acquired a taxing situs elsewhere.

Justice Frankfurter stated the decisive feature of the *Miller case* to be the fact that it had not appeared that any defined part of the domiciliary corpus had acquired a permanent location, i. e., a taxing situs, elsewhere; and that this having been the decisive feature of the *Miller case* was subsequently recognized by the Court in *Johnson Oil Ref. Co. v. Oklahoma*, 290 U. S. 158, 78 L. Ed. 238, 54 S. Ct. 152, which latter case was strongly urged by Northwest in opposition to the Minnesota full value tax. In the *Johnson Oil case* the state seeking to impose the full value tax upon the entire fleet of tank cars was a foreign state, not the home state of Illinois; and, accordingly, Justice Frankfurter stated, that case fell outside the *Miller case*, whereas, the *Northwest case* comes within the application of the *Miller case*.

Further, it was said, in the opinion, that the doctrine of apportionment in the taxation of instrumentalities engaged in interstate commerce, introduced by *Pullman's Palace Car Co. v. Pennsylvania*, is inapplicable, as the principle of that case is that a non-domiciliary state may tax an interstate carrier engaged in running railroad cars into, through and out of the state, and having at all times a large number of cars within the state; that the doctrine of tax apportionment for instrumentalities engaged in interstate commerce has not been extended to tax units of interstate commerce which visit for fractional periods of the taxing year. For example, Justice Frankfurter points out, in the

Pullman Car case it appeared that "The coaches of the company * * * are daily passing from one end of the state to the other," and "that it is continuous protection by a non-domiciliary State—that is protection throughout the tax year—which has furnished the constitutional basis for tax apportionment with respect to interstate commerce situations." Justice Frankfurter stated that the taxing power of the domiciliary state has a very different basis; that no judicial restraint has been applied against the power of the domiciliary state to tax all property of its residents, except to such property (or a portion of fungible units) as is permanently situated in a state other than the domicile; and that "permanently" means continuously throughout the year, not a fraction thereof, whether days or weeks. Justice Frankfurter adds that such was the meaning of the unanimous decision in the *Miller case*, or the *Miller case* decided nothing, and quotes the following language from the opinion of Mr. Justice Holmes in that case: "But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months, and then brought back. Using the language of domicile, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts." Then Justice Frankfurter goes on to conclude that surely the power of the state of origin to "tax its own corporations for all their property within the state during the tax year" cannot constitutionally be affected whether the property takes fixed trips or indeterminate trips so long as

the property is not "continuously without the state during the whole tax year." (p. 594).

With respect to the apportionment doctrine of taxation, Justice Frankfurter declared:

"Although a part of the taxing systems of this country, the rule of apportionment is beset with friction, waste and difficulties, but at all events it grew out of, and has established itself in regard to, land commerce."

The final observation of Justice Frankfurter concerning the rule of the *Miller case*, which he declared applicable in the *Northwest case*, is that such rule does not subject property permanently located outside of the domiciliary state to double taxation; and that not to subject property which has no locality other than the state of its owner's domicile to taxation in the domiciliary state would free such "floating property" from taxation everywhere.

CONCURRING OPINION OF MR. JUSTICE BLACK.

Mr. Justice Black, although concurring in the conclusion and judgment in the *Northwest case*, did not wholly accept the views expressed in the opinion of Mr. Justice Frankfurter announcing the judgment. Justice Black agreed that the State of Minnesota was empowered to impose the full value ad valorem tax upon the entire Northwest Airlines fleet engaged in interstate commerce; but he would not have foreclosed consideration of the taxing rights of states other than Minnesota. Justice Black expressed doubt that a state is prohibited from applying its general tax laws to property engaged in interstate commerce unless such

state is able to make two correct prophecies as to what this Court ultimately may hold, namely: (1) The permissible total of taxes which might be imposed by an aggregate of states on the property engaged in interstate commerce among such states; and (2) The proportion of this total which the state itself fairly may claim. It was suggested by Justice Black that the problems call for Congressional action definitive of the taxing power of states with respect to taxation of instrumentalities of interstate commerce.

CONCURRING OPINION OF MR. JUSTICE JACKSON.

Mr. Justice Jackson also concurred with the conclusion and judgment upholding the full value tax imposed by the State of Minnesota upon all of the Northwest Airlines flight equipment engaged in interstate commerce; but he declined to accept the opinion announcing the judgment of the Court, for the reason that since Minnesota was the "home port" of the fleet in an operational as well as domiciliary sense, the Court should have also declared the Minnesota tax to be exclusive of any other tax upon the same property by other states.

DISSENTING OPINION OF MR. CHIEF JUSTICE STONE, MR. JUSTICE ROBERTS, MR. JUSTICE REED AND MR. JUSTICE RUTLEDGE.

Four members of the Court (Chief Justice Stone, Justice Roberts, Justice Reed and Justice Rutledge) dissented from the decision in the *Northwest* case. The basis for the dissent was that, in view of the clear right of non-domiciliary states to impose an apportioned property tax upon the flight equipment op-

erated within and through their boundaries, to permit Minnesota the right to tax the same equipment at full value would necessarily constitute an undue burden upon interstate commerce, violative of the Commerce Clause of the Constitution.

In their opinion, written by Chief Justice Stone, it was noted that the decisions of this Court clearly establish that the power of states to tax chattels depends upon physical presence and that such power is neither added to nor detracted from by the fact of domicile, except in those cases where tangibles have nowhere acquired a tax situs based upon physical presence and therefore remain taxable at the domicile of the owner. As examples of situations in which the movement of vehicles into other states may be so sporadic as to acquire no tax situs in such other states and hence remain taxable for full value by the state of the owner's domicile, the *Miller case*, supra, and *Southern P. Co. v. Kentucky*, 222 U. S. 63, 56 L. Ed. 96, 32 S. Ct. 13 (322 U. S. at 312), were cited.

Chief Justice Stone observed that the *Northwest Airlines case* squarely raises the issue which the *Miller case* found unnecessary to decide, but an issue which this Court has consistently answered by requiring apportionment according to regular use within and without the taxing state. In the *Miller case* the cars moved about almost at random. Whereas in the *Northwest case*, said Chief Justice Stone, although no particular plane was constantly within any state, the planes are "continuously engaged in flying from state to state" on "regular schedules along fixed routes"; and that "an average number or a percentage of the total is

regularly, i.e., 'permanently' within each of the states through which they pass." (322 U. S. at 321, 322).

Regarding the adoption of the exclusive "home port" theory of taxing aircraft, Chief Justice Stone declared that the same difficulties which led to the abandonment of that doctrine with respect to taxation of vessels would be encountered, i.e., the fact that other states afford the same services and facilities, for practical purposes.

Obviously the dissenting members of the Court visualized the appearance of a case just such as the matter now at bar. In criticizing the theory of basing a full value tax upon the peculiar domiciliary status of Minnesota, it was observed that, even if the record in the *Northwest case* justified a finding that Minnesota alone could be regarded as the "home state," there is "no assurance that in taxing planes operated by other and more complex business organizations, one state will have any greater claim to that designation than several others, and the Court's opinion furnishes no test to guide in the choice among them, if choice has any relevance." (322 U. S. at 319).

With respect to the application of the doctrine of tax apportionment and the solution of the attendant problem of multiple taxation, Chief Justice Stone stated that this Court has recognized that "such instruments of interstate transportation, at least if moving over fixed routes on regular schedules, may thus acquire a tax situs in every state through which they pass. And it has met the problem of burdensome multiple taxation by the several states through which such vehicles pass by recognizing that the due process clause

or the commerce clause or both preclude each state from imposing on the interstate commerce involved an undue or inequitable share of the tax burden." (322 U. S. at 313, 314).

MEANING AND EFFECT OF NORTHWEST AIRLINES CASE.

Due to the peculiar relationship between the State of Minnesota and the airline corporation in the *Northwest case*, upon the basis of which the right of Minnesota to tax all of the fleet was sustained, it is clear that in the case at bar no state has the power to impose a full value tax upon the interstate fleet of the appellant.

The importance of the *Northwest case*, with respect to its application in the case at bar, lies not so much in the holding of the Court as in the views expressed by the various members of the Court. In order to fully present our position herein, we find it necessary to undertake an analysis and appraisal of the four separate opinions which were issued in that case.

We have previously noted that the opinion announcing the decision of the Court, written by Justice Frankfurter and shared by Justices Douglas and Murphy, expressly declined to take any position as to any further taxability of the fleet by states other than Minnesota. It is with great caution and considerable reluctance that we indulge in some conjecture over the possible conclusions to be drawn from the *Northwest case* regarding the possibility of an apportioned tax with respect to flight equipment engaged in interstate air commerce under circumstances such as are present in the case at bar.

It is evident that six members of the Court (Chief Justice Stone, together with Justices Roberts, Reed and Rutledge, who joined in the dissenting opinion; and Justices Black and Jackson, each of whom concurred separately) all were of the opinion that the decision of the Court as announced did not deny or foreclose the right of other states to tax some portion of the interstate air fleet. Their conclusion, indeed, finds support in the language of the opinion of Justice Frankfurter wherein, following a declaration as to the unsatisfactory aspects of the doctrine of tax apportionment, it was stated, at page 300 of the U. S. Report:

"To what extent it (the doctrine of tax apportionment) should be carried over to the totally new problems presented by the very different modes of transportation and communication that the airplane and radio have already introduced * * * raise questions that we ought not to anticipate; certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship." (Parenthetical comment ours.)

The language quoted would seem to afford some basis for an implication that tax apportionment might be applicable to interstate air fleets, coupled with a suggestion that the extent and manner of such application should be given appropriate consideration by Congress.

This much is clear, the decision in the *Northwest Airlines case* can in no way be regarded as authority for denial of the tax involved in the case at bar. How-

ever, the appellant has sought to interpret the case in such a way as to support its position that tax apportionment cannot be extended to the realm of interstate air commerce.

We concede that in the opinion announcing the Northwest Airlines decision, it was stated that the doctrine of apportionment has never been extended to units of interstate commerce which visit a state for "fractional periods" of the taxing year; that it was stated that the only constitutional basis for tax apportionment by non-domiciliary states in interstate commerce situations is the continuous protection of the units involved by the state seeking to impose the apportioned tax, and that the term "continuous" must be defined as meaning protection "throughout the tax year", as opposed to "a fraction thereof, whether days or weeks." We further concede that it was stated, in the opinion referred to, that the power of a domiciliary state to tax its own corporations for all their property within the state during the tax year cannot constitutionally be affected by whether the property takes fixed trips or indeterminate trips without the state, but that not to subject property which has no locality other than the domicile of its owner would "free such floating property from taxation everywhere."

Bearing in mind that the flight equipment involved in the *Northwest Airlines* case was continuously operated within several states according to regular schedules and over fixed routes, very much like the operation of the flight equipment in the case at bar, the statements in the opinion referred to afford some basis for the appellant's contention that the par-

ticular opinion is support for denial of any right to apportioned tax by non-domiciliary states in a situation such as existed in the *Northwest case* and such as exists in the case at bar.

For these reasons, and perhaps with insufficient adherence to the better part of valor, we are compelled to suggest that any implication which might be drawn from the *Northwest Airlines case*, to the effect that the doctrine of tax apportionment cannot be applied to afford a basis for taxation of flight equipment by non-domiciliary states, is not supported by the views of a majority of the Court who participated in that case. To be specific, the four dissenting Justices expressly declared the apportionment doctrine to be applicable to interstate air commerce, even to the extent of prohibiting a domiciliary state, such as was Minnesota, from imposing a tax on any other basis than apportionment in common with other states within the system of transportation; and Justice Black, although he would permit a full value tax by a state which occupied a peculiar domiciliary status such as Minnesota, clearly was of the opinion that neither "in reason or in the Constitution" is there anything which should prohibit proportionate taxes by "an aggregate of states" upon property involved in interstate commerce. Justice Black did, however, take note of the problems which might be expected to arise in the application of the apportionment doctrine to the field of air transportation; and he very appropriately suggested the need of formulative Congressional action. Thus, the view that the apportionment doctrine is inapplicable to interstate air commerce of the nature involved in the case at bar could not possibly be at-

tributed to any greater number than four of the nine members of the Court who took part in the *Northwest case*.

CONGRESSIONAL INTEREST.

Apropos of Justice Black's suggestion of needed Congressional action with respect to the application of tax apportionment to air commerce, it might be noted in passing that, prompted by the invitation presented in the *Northwest case*, Congress has undertaken to concern itself with the problem. Pursuant to the direction of Public Law 416 of the Seventy-eighth Congress, the Chairman of the Civil Aeronautics Board has submitted certain conclusions and recommendations with respect to multiple taxation of air commerce, the same being contained in House Document No. 141 of the 79th Congress, 1st Session. Although the fairness of the allocation formulae contained in the Nebraska statutes here under consideration is not challenged by the appellant, it is interesting to note the following reference to allocation contained in House Document 141, at page 45:

"Allocation of the tax base provides a method for avoiding multiple taxation that can be applied to air transport without material conflict with existing State laws and practices. Few, if any, of the States have rigid allocation formulas written into their tax laws applicable to aircraft or air transport companies. The provisions with respect to allocation are generally sufficiently flexible to accomodate any realistic policy of apportionment."

THE MILLER CASE

The opinion in which the judgment was announced in the *Northwest Airlines case*, written by Mr. Justice

Frankfurter, contains several citations of *New York ex rel. New York C. & H. R. R. Co. v. Miller*, supra, upon the basis of which decision it is declared that no part of the Northwest Airlines interstate fleet acquired a tax situs in any of the several non-domiciliary states within and through which the fleet operated, and that the power of a domiciliary state, from which the entire fleet is not continuously absent during the entire tax year, to tax its own corporation for the full value of all of the fleet cannot constitutionally be affected by the fact that the property involved makes trips within and through other states, regardless of whether such trips be fixed or indeterminate.

There can be no dispute but that the decisive feature of the *Miller case* was the fact that the vehicles of interstate commerce there involved had not acquired a tax situs in any of the non-domiciliary states within and through which they were operated, as a result of which the full value of such vehicles was permitted to be taxed by the state of the owner's domicile. However, we cannot agree that there is anything in the language of the opinion announcing the unanimous decision in the *Miller case* from which to draw a conclusion that a fleet of airplanes or other vehicles operating in interstate commerce over fixed routes and according to regular schedules, although not without the domiciliary state at all times, may not acquire a tax situs in the non-domiciliary states such as will support a property tax fairly apportioned according to the use of such fleet within the non-domiciliary states. We submit that the opinion of this Court in the *Miller case* was not authority upon the basis of which to have decided the *Northwest Airlines case*; and that, a fortiori,

it is not authority upon which to defeat the tax in the case at bar, which is not even complicated by the circumstance of the fleet operating through one particular state which is the state of incorporation and also the registered home port of the fleet and the principal place of business, i. e., the home state in an operational as well as domiciliary sense, such as was the situation in the *Northwest Airlines case*. We interpret the decision in the *Miller case* as being nothing more than a finding by the Court that, because of the sporadic, irregular, random use of the railroad cars in question within non-domiciliary states, the cars could not be regarded as having acquired a tax situs to any extent in such non-domiciliary states and, accordingly, that the domiciliary state from which such cars were not continually absent during the tax year was permitted to impose a tax based upon the full value of such cars. There is nothing in the opinion to justify a conclusion that the decision would have been the same even though the cars were operated within the non-domiciliary states with frequent regularity and according to definite schedules. In the *Miller case* the domiciliary state, New York, had imposed a tax upon the railroad corporation based upon the full value of rolling stock which was occasionally used beyond the boundaries of the State of New York. The corporation contended that it should not be taxed on the basis of the full value of rolling stock which was used partially in other states. In an effort to support its contention the company offered evidence to show that "a certain proportion of cars, although not the same cars, was continuously without the state during the whole tax year." It was clearly established by the evidence, in fact conceded by the company, that none of the rolling stock

was outside of the domiciliary state during the whole tax year and that the cars were not regularly employed outside the domiciliary state. In denying the contention of the railroad, the Court said that the domicile retains the power to tax all of the property of its corporations, "notwithstanding its occasional excursions to foreign parts." We submit that the language "occasional excursions" has a distinct and unambiguous meaning which cannot be paraphrased away into meaning "continuous interstate operations over fixed routes and according to regular schedules." Yet that is the meaning which the appellants herein would have ascribed to the language of the *Miller case* opinion, with apparent support by some of the language in one of the opinions issued in the *Northwest Airlines case*. The untenability of what we regard as a distortion of the *Miller case* decision is further illustrated by the Court's discussion of *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876. It had been urged by the railroad, in the *Miller case*, that the situation was but the complement of the *Pullman Car case* which had sustained the application of an apportioned tax by a non-domiciliary state through which the rolling stock was operated in interstate commerce, and that, by analogy, the value basis upon which the domiciliary state of New York could tax the railroad property in the *Miller case* should be reduced to an extent corresponding to the taxes which might be levied by other states under the authority of the *Pullman Car case*. In rejecting this theory advanced by the railroad in the *Miller case*, the Court observed that in the *Pullman Car case* it had appeared that:

"The same cars were continuously receiving the protection of the (non-domiciliary) state, and,

therefore, it was just that the state should tax a proportion of them." (202 U. S. at 597).

The Court then went on to distinguish between the regular use which existed in the *Pullman Car* case and the sporadic use which existed in the *Miller* case, which the Court was then deciding, saying:

"Whether, if the same amount of protection had been received in respect of constantly changing cars, the same principle would have applied was not decided (in the *Pullman* Case), and it is not necessary to decide now. In the present case, however, it does not appear that any average of cars was so continuously in any other state as to be taxable there. The absences relied upon were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by * * * arbitrary convenience * * *." (p. 597, 598). (Parenthetical comment in both quotations ours.)

It appears to us that the unavoidable significance of the foregoing analysis of the *Pullman Car* case, made by the Court in the *Miller* case, is that the non-domiciliary states involved in the *Miller* case would have no power to tax any portion of the rolling stock for the sole reason that the interstate use of such equipment was not regular and habitual; and, by inference, that had the rolling stock been a fleet of cars all of which were continuously employed in systematic interstate commerce over definitely prescribed routes and according to pre-established schedules, the Court would have found that such a fleet had acquired a tax situs such as would permit taxation of some proportion of the fleet by the various non-domiciliary states embraced within the system. The *Miller* case decision does not

support the proposition that all tangible property which is not outside the domiciliary state at all times may be taxed at full value by the domiciliary state; nor does the *Miller* decision support the correlative proposition that a non-domiciliary state may not, under any circumstances, acquire jurisdiction to tax tangible property which is within the domiciliary state at some time during the tax year; nor does the *Miller case* support the further correlative proposition that tangible property, some part of which does not remain constantly within a non-domiciliary state at all times during the tax year, may never acquire a tax situs such as to afford a measure of taxation of such property by such non-domiciliary state. Not only are such propositions without support from the decision in the *Miller case*, or other decisions of this Court, but the intolerable results which might arise from their application militate against their adoption at any time. Under the propositions above discussed, if carried to their logical conclusion, the following situations might occur: (1) Assuming that a fleet of airplanes, a fleet of railroad cars or a fleet of motor trucks, were engaged in interstate commerce within a number of states in a system of transportation conducted according to regular schedules and over fixed routes and that the domiciliary state of the corporation owning the transportation company was not one of the states within which the transportation system regularly operated. Nevertheless, if at some time once each year each of the fleet units were taken into the domiciliary state, though only momentarily and for no purpose related to the interstate transportation system, the entire fleet would then be subject to a full value property tax by the domiciliary state, and the non-domiciliary states within which

the system operates would be powerless to tax the fleet to any extent; or, (2) Assuming that of a fleet of vehicles (land, water or air) engaged in interstate commerce within a number of states, conducted according to regular schedules and over fixed routes, but not within the state of owner's domicile, once each year every unit were taken into some non-domiciliary state within which the transportation system did not operate; in such case, the result would be complete immunity of the fleet from property taxation by any state.

COMPARISON OF CASES BEFORE AND AFTER MILLER CASE.

We contend that both before and since the *Miller case* this Court has recognized the principle that a fleet of vehicles engaged in interstate commerce may acquire a tax situs in non-domiciliary states such as will support an apportioned property tax, notwithstanding the fact that there may not be some vehicle of the fleet within the taxing state at every instant, or even every day, of the tax year. *Northwest Airlines v. Minnesota*, supra, 322 U. S. at 324. Nor is the *Miller case* any departure from this principle. We further contend that a situs to support the imposition of an apportioned property tax by a non-domiciliary state upon a fleet of vehicles engaged in interstate commerce, be it land, water or air, exists when such vehicles travel within such non-domiciliary state as components of a fleet continuously engaged in a system of interstate commerce according to regular schedule and over fixed routes. Such is the factual situation in the case at bar. This was also the factual situation in the *Northwest Airlines case*. However, due to the peculiar status of the taxing domiciliary state of Minnesota, upon which the judg-

ment of the court in that case was predicated, the principle which we here advance is left unimpaired by the decision in the *Northwest* case.

An interesting case, affirmatory of our position herein, which was decided by the Circuit Court of Appeals for the District of Columbia, is *District of Columbia v. Smoot Sand & Gravel Co.*, 184 F. (2d) 987, cert. denied 340 U. S. 933; the applicability of which case the appellant seeks to avoid by relating that the case involved water transportation. The Circuit Court in the *Smoot* case found that the vessels of the respondent, a foreign corporation, "came into the District from places of deposit on an average of once a day but spend more time out of the District than in the District;" and that some of the vessels were licensed and enrolled at the port of Alexandria, Virginia (p. 989). After reviewing the decisions of this Court relating to apportioned property taxes, the Circuit Court, at page 991 of the Federal Report, declared:

"Under the foregoing decisions there can be little question that respondent's vessels have a situs in the District which would support an apportionment tax. The basis underlying the cases is explained and left unimpaired in *Northwest Airlines v. Minnesota* * * *."

The Court went on to say:

"The facilities of the community are available to it and to its equipment, which moves in and out of the District not in a temporary or transient fashion but in a constant and continuing pattern of business operations. Presence of the vessels in the District is neither incidental, sporadic nor spasmodic. They are 'habitually employed' in the District."

The principle which we advance was recognized, by necessary implication, in the frequently cited case of *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150, 26 S. Ct. 36, which was decided before the *Miller* case. In the *Union Refrigerator* case this Court denied the power to a domiciliary state to impose a property tax upon cars regularly employed within other states, although it was clearly established that all of such cars came into the domiciliary state at times during the tax year.

The principle which supports the right of Nebraska to impose an apportioned property tax upon the flight equipment involved in the case at bar, was recognized in *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 78 L. Ed. 238, 54 S. Ct. 152, decided some ten years prior to the *Miller* case. It appeared in the *Johnson Oil Refining Co. case* that the owner of the tank cars involved was an Illinois corporation which also had its principal place of business in that state; that the tank cars involved were used in the transportation of oil products from the owner's refinery located in Oklahoma, although sometimes cars were loaded at refineries in states other than Oklahoma; that in connection with each shipment the practice was to bill back the cars to the Oklahoma base of operations; that the cars were "almost continuously in movement" and were "almost exclusively" engaged in interstate commerce; that the cars were occasionally, but infrequently, used in connection with an oil plant of the corporation located in the domiciliary state of Illinois. The specific issue presented by the *Johnson Oil* case was whether Oklahoma had the power to impose a property tax upon the entire fleet of tank cars, as opposed to an appor-

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tioned tax based upon the average number of cars within the state on any one day, or some other formula designed to fairly apportion the tax according to the use within the state compared with the use without the state. This Court decided that the tax should be apportioned and that Oklahoma did not have the power to impose a full value tax. Although the specific issue presented in that case is distinguishable from the issue involved in the case at bar, the principles recognized in the unanimous decision of the Court clearly support the application of an apportioned tax such as the Nebraska tax in the case at bar. The opinion in the *Johnson Oil* case was prefaced with a statement of the basic premise that the mere fact property is engaged in interstate commerce "does not make it immune from a non-discriminatory property tax in a State which can be deemed to have jurisdiction." The remainder of the opinion is devoted to a spelling out of what is regarded as providing "jurisdiction" for the imposition of a nondiscriminatory apportioned property tax upon vehicles engaged in interstate commerce. The Court declared, at page 162 of the U. S. Report of the opinion:

"While, in this instance, it cannot be doubted that the cars in question had acquired an actual situs outside the State of Illinois, the mere fact that the appellant had its refinery in Oklahoma would not necessarily fix the situs of the entire fleet of cars in that State. The jurisdiction of Oklahoma to tax property of this description must be determined on a basis which is consistent with the like jurisdiction of other states."

The Court further said:

"When individual items of rolling stock are not continuously the same but are constantly changing,

as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits."

In conclusion, the court stated:

"Applying these principles, no ground appears for the taxation of all the cars of the appellant in Oklahoma. It is true that the cars went out from and returned to Oklahoma, being loaded and re-loaded at the refinery, but they also entered and were employed in other States wher the oil was delivered. Oklahoma was entitled to tax its proper share of the property employed in the course of business which these records disclose, and this amount could be determined by taking the number of cars which on the average were found to be physically present within the State."

The airline-appellant in the case at bar seeks to avoid the effect of the principle recognized in the *Johnson Oil case* by claiming the case is distinguishable on the facts due to the circumstance that a large average number of cars were present within the state at all times. This effort on the part of the appellant prompts us to clearly define our position herein. In the event the jurisdiction of a non-domiciliary state to impose an apportioned property tax upon a fleet of vehicles engaged in interstate commerce within such state cannot exist, under any circumstances, unless there is some vehicle of such fleet actually present within the taxing state at every minute throughout the taxing year, then, if such be the test, we would here and now concede that the State of Nebraska has no jurisdiction to impose the tax in question. However, such has never been the consensus of opinion of the members of this Court

at any time; and it most surely is not the meaning of the decision in the *Johnson Oil case*. True, some of the opinions have contained words such as "permanent" and "continuous" in describing the use of property outside a state of domicile, which use would have the effect of depriving the domiciliary state of power to impose a property tax upon that particular property. However, an examination of those opinions reveals that neither the effect nor the intent thereof is to prohibit the imposition of an apportioned property tax by a non-domiciliary state upon a fleet of vehicles engaged in interstate commerce within such state unless, in all events, there was some vehicle of the fleet actually present within the confines of the taxing state at every instant of the tax year. We believe that mere examination of these previous opinions leads to the conclusion that the words "permanently" or "continuously," when considered in view of the context in which used, were intended to convey the thought that the property must be used and employed habitually or consistently within the state as a part of a transportation system operated with regularity as to schedules and routes, as distinguished from property which is used and employed irregularly in the course of sporadic trips or random excursions regulated only by the arbitrary convenience of the owner. Whatever doubt might have prevailed as to this being the true meaning of such terms was completely dispelled by the opinion in the *Johnson Oil case* from which we have quoted in the next preceding paragraph hereof. The fact that the previous decisions, in connection with which words such as "permanently" and "continuously" appear, were cited in support of the propositions expressed in the *Johnson case* is unquestionable evidence of the fact that

the unanimous Court interpreted such previous opinions in the same manner as we advance herein. The physical facts in those earlier cases happened to be such that some vehicle invariably was physically present within each of the non-domiciliary states involved at all times during the tax period. Therefore, by the nature of the transportation systems involved in those cases, it could not matter whether the doctrine of non-domiciliary taxing jurisdiction were premised upon actual presence of some vehicle within the state at all times, or whether such jurisdiction required only consistent or habitual presence as an integral part of a system of transportation continuously engaging in interstate commerce with regularity as to schedules and routes. Although the necessity for clearly defining such a distinction was not presented in the *Johnson Oil case*, it is more than likely that the Court envisioned the possibility, if not inevitability, of such a fine distinction being required in the future, due to the rapid growth and diversification which was taking place in the transportation industry; and that, for this reason, Mr. Chief Justice Hughes, in drafting the opinion of the Court, by the use of language of a somewhat greater degree of refinement, made it eminently clear that the doctrine of tax apportionment by non-domiciliary states was not dependent upon the actual presence of some portion of the fleet at all times constantly throughout the tax year; but, rather, that the prerequisite to application of the doctrine was consistent, habitual use and employment of the vehicles within the state as a part of a system by which interstate commerce was conducted according to regular schedules and over fixed routes. This interpretation entails no violence whatsoever to the calculation of a "daily average number

of cars present" or the use of the mileage formula which was enunciated in the *Pullman Car case*, and which formula continues to epitomize the principle of fair apportionment; as an average number of cars present within a given state on a given day, within the meaning of the *Pullman Car case*, is capable of calculation notwithstanding the fact that the number of cars comprising the fleet might be so few that the average number present each day is but a fractional component of one car. Adoption of a contrary view, such as is contended for by the appellant herein, would result in the absurd result that if a fleet of railroad cars were being continuously operated in a system of interstate commerce over definitely established routes and according to a regular schedule under which there was at least one car within each state in the system at all times during every day of the taxing year, then each of the states could impose an apportioned property tax upon the fleet; yet, in the event the speed of the system were slightly increased, intentionally or otherwise, with the result that for one minute of each day (or, even, of but one day) in each of the states there were no cars present, then none of the states could tax under appellants theory that there was not "permanent" and "continuous" presence of some of the cars at all times.

THE "HOME PORT" THEORY OF TAXATION.

Mr. Justice Jackson concurred with the decision upholding the right of Minnesota to impose a full value tax upon the flight equipment involved in the *North-west case*; but he refused to accept the opinion announcing the decision because the right of Minnesota to tax the property was not declared to

be exclusive of all other taxes upon the same property by other states. The position of Justice Jackson is clear. He feels that, on the basis of the "home port" doctrine historically applied to vessels engaged in water transportation, a fleet of airplanes engaged in interstate air commerce should be taxed at their full value in the home port state, and that the doctrine of apportioned taxation should never be extended into the realm of air commerce.

The basic premises of the theory of exclusive "home port" taxation appear to be that "aviation has added a new dimension to travel and to our ideas;" that "the air is too precious as an open highway" to permit surface proprietors or local governments to exclude or embarrass commerce therein; and that to authorize any local burden to be imposed upon air commerce would lead to the multiplication of such burdens throughout the country.

We cannot disagree that the advent of air travel has opened a vast new field of commerce. However, this most recent advancement in mode of travel is no more important a departure from the old than was the advancement from the horse-drawn vehicle to modern rail and motor carrier equipment. Precisely the same arguments could have been, in fact were, at first advanced against the imposition of local taxes upon vehicles employed in other forms of transportation which are now soundly established and operating in a generally satisfactory manner.

Be that as it may, as was pointed out by Justice Jackson, any indirect subsidization of the air industry in the form of immunity from state taxation must

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come from Congress; and, in the absence of such congressional action, the sole function of the judiciary is to determine what taxes may be lawfully imposed. It has been suggested that the application to air commerce of the doctrine of exclusive taxation by the fleet home port is most consonant with the purposes of the Commerce Clause. However, Justice Jackson foresees the difficulties which would be encountered in the application of the home port doctrine to airplanes engaged in interstate commerce, for the reason that federal registration of airplanes does not establish statehood. Although the dual status which prevailed with respect to the State of Minnesota in the *Northwest Airlines case*, where Minnesota was both the corporate domicile and the federally registered home port, seemed to Justice Jackson sufficient basis for concluding that Minnesota was the "home port" within the meaning of the water transportation decisions, he acknowledges that in a situation in which the state of domicile and the state of federal registration were not the same, the basis for the conclusion would be absent. Accordingly, if we correctly interpret the meaning of the Justice Jackson opinion, in a case such as the one now at bar, where the state of corporate domicile and the state of federal registration are not the same, the home port doctrine of full taxation might not apply. This situation would then require a choice between two remaining possible bases for taxation. One is to permit full value taxation by the state of corporate domicile. However, Justice Jackson rejected this theory of taxation by his disagreement with the view of Justice Frankfurter that domicile was decisive in the *Northwest case*. As Justice Jackson pointed out, the domiciliary theory of taxation is un-

tenable because it would permit taxation by the domiciliary state of a fleet of vehicles engaged in interstate commerce, even though vehicles were not operated within the domiciliary state. The other possible basis for taxation in such a situation is the apportionment theory, which, of course, is the type of tax we seek to affirm in these proceedings. In advancing the home port theory of taxation as being the best analogy in existing decisions for application in the *Northwest Airlines* case, Justice Jackson expressed dissatisfaction with the idea of extending the apportionment doctrine to air commerce, saying, at page 306 of the U. S. Report:

"It is established in our decisions and has been found more or less workable with more or less arbitrary formulae of apportionment. Nothing either in theory or in practice commends it for transfer to air commerce. A state has a different relation to rolling stock of railroads than it has to airplanes. Rolling stock is useless without surface rights and continuous structures on every inch of land over which it operates. Surface rights the railroad has acquired from the state or under its law. There is a physical basis within the state for the taxation of rolling stock which is lacking in the case of airplanes."

We cannot agree that there is no physical basis within the state for the taxation of airplanes. It is true, the nature of the "physical basis" is somewhat different in the case of airplanes than in the case of rolling stock, just as the means of locomotion of the two modes of transportation is somewhat different. It is said "rolling stock is useless without surface rights." It is difficult to conceive of any usefulness which might be attributed to an airplane which

had no contact with the surface and did not utilize various facilities located upon the surface of states through which it functioned in a system of interstate commerce. Without facilities to land and take off, without facilities by means of which passengers and freight can be conveyed to and from the airplanes, without facilities for obtaining fuel and other necessary servicing, what would be the value of a fleet of airplanes? Certainly it cannot be thought that any different conclusion is dictated by the fact that such facilities might be employed by virtue of leasing or other contractual arrangements, rather than under complete ownership of the airline company.

ALL INTERSTATE COMMERCE IS ON THE SAME CONSTITUTIONAL FOOTING.

Whatever justification there may have been, at the time of the *Northwest Airlines* decision, for a thought that different doctrines of taxation should be applied to different modes of transportation in interstate commerce, all justification has been completely dissipated by later decisions of this Court.

Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169, 93 L. Ed. 585, 69 S. Ct. 432, sustained an apportioned ad valorem property tax imposed by the non-domiciliary State of Louisiana upon a line of barges operated in interstate commerce. Similarly to the airplanes in the case at bar, the barges in question were owned by a foreign corporation, the domicile of which was in Ohio. Also similarly to the case at bar, the barges were enrolled or registered outside of the non-domiciliary taxing state. A circumstance

not encountered in the case at bar was the fact the barges were not outside of the domiciliary state at all times during the tax year. The barges were within the taxing non-domiciliary state "for such comparatively short periods of time as are required to discharge and take on cargo and make necessary and temporary repairs." Needless to say, the vessels did not traverse the surface of the taxing state. This Court permitted the non-domiciliary State of Louisiana to levy an apportioned ad valorem tax upon the vessels. In sanctioning the application of the rule of tax apportionment such as developed in connection with rolling stock in interstate commerce, the Court, in the *Mississippi Valley Barge* case, completely abandoned the old home port theory of exclusive taxation of instruments of water transportation by the domicile of the owner. The Court declared that, so far as constitutionality was concerned, there is no practical difference "whether it is vessels or railroad cars that are moving in interstate commerce." The Court quoted from *Nashville, C. & St. L. R. Co. v. Browning*, 310 U. S. 362 at 365, 84 L. Ed. 1254, 60 S. Ct. 968, saying that the problem under the Commerce Clause is to determine "what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions." Later in the opinion the Court stated, at page 175 of the U. S. Report:

"We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises."

The appellant in the case at bar seeks to obscure the significance of the *Mississippi Valley Barge* case by pointing out the circumstances surrounding the

question of whether the barges in question had acquired a tax situs within the non-domiciliary State of Louisiana. In an effort to revive its faltering proposition that constant presence of some portion of the fleet within the taxing state at all times during the tax year is necessary to create a tax situs, the appellant quotes from the language of the opinion in which the Court noticed a factual controversy on this score; which matter the Court declined to make any effort to resolve due to the fact that the Louisiana Attorney General had stated in his brief that the tax applied only to property within the state "throughout the taxing year." The Court then followed with the suggestion that any errors in assessment should have been corrected by resort to appropriate local administrative or judicial remedy. It is important to note that the reference to the property being within the taxing state "throughout the taxing year," was a direct quotation from the language of the brief, and was not the language of the Court. We have heretofore discussed rather fully the interpretation of the expressions such as "permanently" and "continuously", used in earlier opinions, as meaning consistently, regularly and habitually, rather than meaning absolutely at all times. We shall not indulge in a needless reiteration of the matter at this point. However, we do wish to emphasize that, rather than lending any support to the contrary interpretation, the opinion in the *Mississippi Valley Barge* case is entirely consistent with our interpretation. It is significant that this Court referred to the finding of the federal District Court to the effect that there was no showing that the particular portion of the property sought to be taxed was "regularly and habitually"

used in Louisiana. It was the decision of the District Court denying Louisiana the right to tax which this Court reversed in sustaining the apportioned tax. In the event it were the sense of this Court at that time that language, "regular and habitual" did not properly express the criterion for an apportioned tax, it is reasonable to assume the Court would have called attention to the fact.

However, the *Mississippi Valley Barge* case is important, not so much because of its approval of the imposition of an apportioned tax by a non-domiciliary state, as that doctrine had been previously established; but the great significance of the case lies in the fact that it was the first occasion for a judicial declaration of the practical fact that interstate commerce is any commerce between the states, regardless of the mode of intercourse by means of which such commerce is conducted.

The marked significance of this aspect of the *Mississippi Valley Barge* case was recognized in the later case of *Standard Oil Co. v. Peck*, 342 U. S. 382, 96 L. Ed. 427, 72 S. Ct. 309, in which the Court said, at page 385 of the U. S. Report:

"Under the earlier view governing the taxability of vessels moving in the inland waters (*St. Louis v. Wiggins Ferry Co.*, (U.S.) 11 Wall 423, 20 L ed 192; *Ayer & Lord Tie Co. v. Kentucky*, 202 US 409, 50 L ed 1082, 26 S Ct 679, 6 Ann Cas 205; cf. *Old Dominion S. S. Co. v. Virginia*, 198 US 299, 49 L ed 1059, 25 S Ct 686, 3 Ann Cas 1100) Ohio, the state of the domicile, would have a strong claim to the whole of the tax that has been levied. But the rationale of those cases

was rejected in *Ott v. Mississippi Valley Barge Line Co.*, 336 US 169, 93 L ed 585, 69 S Ct 432, where we held that vessels moving in interstate operations along the inland waters were taxable by the same standards as those which *Pullman's Palace Car Co. v. Pennsylvania*, 141 US 18, 35 L ed 613, 11 S Ct 876, first applied to railroad cars in interstate commerce. The formula approved was one which fairly apportioned the tax to the commerce carried on within the state. In that way we placed inland water transportation on the same constitutional footing as other interstate enterprises."

We submit nothing could be more clear than the fact that this Court has now placed all interstate transportation enterprises on the same constitutional footing with respect to taxation of property employed in interstate commerce; that is to say, equipment regularly and habitually used within states as a part of a system of interstate transportation is subject to ad valorem property taxes by each of such states, the tax to be fairly related to the use within each taxing state.

Standard Oil v. Peck is of further interest because of an acknowledgment by the Court, although tacit, so clear as to leave no room for doubt, that the application of the doctrine of apportioned taxation of instrumentalities of interstate commerce is not contingent upon actual presence of some part of the fleet within the taxing state at every moment of the year. We refer to that portion of the opinion wherein the Court was distinguishing the *Miller* case. The Court declared that in the *Miller* case it did not appear that any specific cars or any average of cars "was so

continuously in another state as to be taxable there." It is evident, from the use of the words, "so continuously," that the Court did not conceive the term "continuously" to mean that there must constantly be at least one unit of the fleet present at every instant of the year. The language of the Court is further authority for our interpretation that the basis for tax apportionment is habitual and regular presence.

Certainly the situation involved in the case at bar, wherein all units of a fleet of fourteen airplanes engaged in interstate commerce in a continuous circuit are within the State of Nebraska with such consistency and regularity that each day a total of four flights come into the state, accompanied with the usual incidents of receiving and discharging passengers and freight, fueling and servicing of equipment, is such as to clearly constitute presence within the state such as will create a tax situs to support a tax under the apportionment doctrine. To hold otherwise would be tantamount to a judicial grant of immunity from taxation for flight equipment, except in those rare instances when one particular state would be permitted to impose a full value tax upon the entire fleet under the domiciliary theory expressed in the *Northwest Airlines case*. When, if ever, the day may come that any commercial airline will reach such a degree of magnitude as to have a fleet so vast that one or more of the fleet planes is within each state of the system at every instant of the year, is a subject of speculation such as to almost defy the imagination. Further, if such a condition did come about, the discriminatory result of the constant-presence theory would be that those airlines which had achieved such

proportions would be rewarded with a tax liability, whereas the lesser airlines would continue to enjoy their tax-immune advantage.

RECONSIDERATION OF THE NORTHWEST AIRLINES CASE.

An examination of the various decisions which we have discussed herein, we believe, gives rise to the following conclusions with reference to the matter now before the Court:

(1) That, according to the definitely expressed views of each of the members of the Court before whom the *Northwest Airlines* case was heard, the decision in that case did not declare the apportionment doctrine to be inapplicable to flight equipment engaged in interstate air commerce.

(2) That, at the time of the *Northwest* decision, only one member of the Court expressed a view that the apportionment doctrine should never be applied to air commerce under any circumstances.

(3) That, according to the pronouncements of this court, particularly the opinions issued subsequent to the *Miller* case, it is clear that the basis for the imposition of an apportioned ad valorem property tax upon units of a fleet of vehicles continuously engaged in interstate commerce is the regular and habitual use of such units within the taxing state; and it is not a necessary prerequisite to such taxation that some one or more units of such fleet can be found within the taxing state constantly throughout every day of the tax year.

Perhaps we should content ourselves, for the purpose of the matter now before this Court, with limiting our concern over the *Northwest Airlines* case to an observation that the facts in the case at bar could not possibly afford a basis for full value taxation of the flight equipment here involved, as the peculiar domiciliary status which prevailed with respect to the State of Minnesota and was the basis for the decision in the *Northwest* case is entirely lacking in the present situation.

However, the nature of the operation of the air fleet in that case was so similar to the operation now in question—indeed, so typical of all present-day commercial air operations—that we are moved to suggest to the Court the desirability of some reconsideration of the effect of that decision.

We have reference to the implication, which is inferable from some of the language in the opinion announcing the decision of the Court in the *Northwest* case, that notwithstanding the fact it was Minnesota's peculiar domiciliary-home port-main base of operations status which gave rise to the right to impose a full value tax, the other states through which the Northwest fleet operated could not be said to have a right to impose any tax upon any proportion of such fleet. We have previously expressed our conviction that, to the extent such an implication is to be inferred from the language of that particular opinion, such a view was not shared by a majority of the members of the Court and is not in accord with the previous decisions of this Court. We believe that such an implication is not only a fair one, but a necessary

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one. The only other implication which can be drawn is that there might be situations in which the Northwest Airlines fleet would acquire a situs for an apportioned tax in the other states through which it operated, and that in such a situation a discriminatory and burdensome form of double taxation would receive judicial sanction. Such a situation could not exist in harmony with the decisions of this Court, many of which cases are cited in the dissenting opinion in the *Northwest case*, the conclusions of which opinion we respectfully submit are those upon which the matter should be reconsidered and resolved. That both a full value tax by a domiciliary state and additional taxes by non-domiciliary states through which an interstate fleet operates will not be permitted is definitely indicated by the unanimous opinion in the recent *Standard Oil case*, *supra*, wherein the Court said: "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile." (p. 384). Thus, the first requirement to a full value tax by a domiciliary state should be that it shall appear that the vehicles of the interstate fleet are not subject to an apportioned tax by the other states through which the transportation system operates—i.e., that the units of the fleet are not within the other states regularly and habitually, as component parts of a fleet continuously engaged in interstate commerce. What additional conditions are to be required, such as being the main operational base, the place of federal registration, and the like, would depend upon the extent to which the "business fact" aspect of the *Northwest* decision shall be adhered to in the future.

COMMERCE CLAUSE DOES NOT PROHIBIT STATE TAXATION OF INSTRUMENTALITIES OF INTERSTATE COMMERCE.

The appellant herein asserts that, by virtue of the exclusive control over interstate commerce vested in Congress by the Commerce Clause, the State of Nebraska is prohibited from imposing the tax in question.

To support its contention appellant cites *Best & Co. v. Omaha*, 149 Neb. 868, 33 N. W. (2d) 150, and declares that the failure of the Nebraska Court to apply the principle of that case in its decision in the case at bar below constitutes reversible error. Examination of the *Best* case clearly demonstrates that the Nebraska Court did not apply the principle therein announced to the case at bar below for the obvious reason that the principle is wholly inapplicable. The *Best* case involved the imposition by a municipality of a privilege tax, not an ad valorem property tax, upon the business of conducting certain interstate commerce within the city. The Court very properly held that such a discriminatory tax upon a foreign corporation for the privilege of doing interstate business within a city was an unlawful burden upon interstate commerce and was violative of the Commerce Clause of the Constitution.

Gibbons v. Ogden, 9 Wheaton 1, and *Smith v. Turner*, 7 Howard 283, also cited by appellant, are similarly distinguishable. The *Ogden* case involved an act of the New York legislature granting an exclusive franchise to navigation of all waters within its jurisdiction,

and *Smith v. Turner* involved a state per capita tax upon alien passengers arriving in state ports. Obviously there is no parallel between those cases and the case at bar where we are considering the imposition of an ad valorem property tax.

McCulloch v. Maryland, 4 Wheaton 316, cited by appellant as authority against the taxing powers of states, is wholly inapplicable to the case at bar. That renowned case involved a tax imposed by Maryland upon a bank incorporated under an Act of Congress. As a preliminary observation, it occurs to us that if plaintiff's views as to the meaning of the *Mu*Culloch case were shared by this Court, it is logical to assume that most of the recent cases involving state taxation in matters involving interstate commerce would have been decided much differently than is the case.

In *McCulloch v. Maryland*, the Maryland legislature, in effect, sought to impose a privilege tax upon the doing of business by any other than state-chartered banks. The decision in the case, of course, was based upon the reasoning that the branch of the Bank of the United States was an agency of the federal government. Actually the case rested upon principles of tax exemption, rather than the lack of power to tax.

Appellant also quotes at some length from various writings of legal scholars, including present and former members of this Court. None of these writings express views inconsistent with an apportioned property tax upon vehicles engaged in interstate commerce. The authors merely declare the far-reaching effect of the Commerce Clause and the fact that the states have

no power to impress regulations which are inconsistent with federal regulations and have no power to do anything which has the effect of unduly burdening interstate commerce. None of the writings cited by the appellant can be construed as prohibiting the imposition of a fairly apportioned property tax by states which have acquired property taxing jurisdiction by reason of the use of instrumentalities of interstate commerce.

The fact that interstate commerce, including air commerce, is subject to the dual jurisdiction of federal and local government in connection with which state governments are free to impose regulations to such extent and in such manner as do not conflict with federal regulations or impose an undue burden upon interstate commerce, is so thoroughly familiar a principle as to require no detailed discussion of authority. There is no dispute but that, in view of the peculiar characteristics of air commerce, that field has been, and should be, more comprehensively regulated by the federal government than is the case with respect to other forms of commerce; but such circumstance in no manner detracts from the complete applicability to air commerce of the principles above expressed.

Appellant seems to have lost sight of the fact that even though "a matter is regulable only by one government, it is not thereby exempted from just taxation by the other." *Stone v. Interstate Natural Gas Co.*, 103 F. (2d) 544, aff'd. 308 U.S. 522.

We believe that the authors whom the appellant cites would be quite shocked to learn that they are quoted as authority for the following statement, ap-

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pearing at page 46 of Brief of Appellant: "These learned pronouncements on the constitutional provision prove one outstanding thing: Congress and Congress alone has the right to impose a tax upon aircraft engaged in interstate commerce." Were this bold statement correct, it would be quite embarrassing, we should think, for the appellant to explain just how such fact must have escaped the attention of each of the members of the Court in deliberating the *Northwest Airlines case*. We know, as was so succinctly expressed by the unanimous opinion in *Ott v. Mississippi Valley Barge Line Co.*, supra, 336 U. S. at 174, that "interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders." This is true, regardless of whether the transportational medium by which such commerce is carried on be land, water or air, or a combination thereof.

There is one portion of Mr. Justice Frankfurter's work, "The Commerce Clause Under Marshall, Taney and Waite," the applicability of which to the position of the appellant herein impresses us. We refer to the following, taken from the words of the Honorable James Bradley Thayer, commencing at page 112 of the volume:

"* * * Nothing that is now going forward can exceed the vehemence of denunciation, and the pathetic and conscientious resistance of those who lifted up their voices against many of these supposed violations of the Constitution. The trouble has been, then as now, that men imputed to our fundamental law their own too narrow construction of it, their own theory of its purposes and its

spirit, and sought thus, when the question was one of mere power, to restrict its great liberty.' ”

In its effort to escape the legitimate tax burden sought to be imposed upon it, we submit that the appellant herein has advanced its own too narrow construction.

In the argument to sustain its Law Point II, appellant cites several cases for the announced purpose of demonstrating the permissible extent to which states possess “rights to tax instrumentalities or the owners thereof engaged in interstate commerce.” The conclusion which appellant draws from the cited cases is that any state taxation must be based upon “use of state facilities” and that the revenue derived from such tax must be devoted exclusively to the creation or maintenance of the specific facilities from which the taxpayer receives some “readily distinguishable benefit conferred by the state.”

The inapplicability of the cases cited is patent, as those cases deal exclusively with use or privilege taxes. For example, appellant argues that *Spector Motor Co. v. O'Connor*, 340 U. S. 602, 95 L. Ed. 573, 72 S. Ct. 309, is “an example for the invalidity in the instant case.” We are unable to follow appellant’s reasoning. The *Spector case* is clearly distinguishable from the case at bar, for the reason that there was involved in the *Spector case* a corporate franchise tax for the privilege of doing interstate business in the state. The court in that case held that the tax was violative of the Commerce Clause and void, even though the amount of the

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tax were fairly apportioned to the amount of business done within the state. However, at the same time the court recognized the state might lawfully impose a different form of tax the amount of which might be determined by an apportionment formula similar to the one involved in the case at bar and which might in practical effect be no less a burden upon interstate commerce than the franchise tax. Quoting from the majority opinion, at pages 607, 608, of the U. S. Report:

“* * * Neither the amount of the tax nor its computation need be considered by us in view of our decision of the case. The objection to its validity does not rest on a claim that it places an unduly heavy burden on interstate commerce * * *. The tax is not levied in lieu of an ad valorem property tax. * * * Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so.”

And, further, at page 609:

“* * * the tax before us attaches solely to the franchise of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities or aspects of this business * * *.”

Thus, although the court did not specifically discuss the power of states to impose an apportioned ad valorem property tax it is evident that the Court invalidated the tax in question solely because it was in the form of a boldfaced tax upon the right to do business within the state. There is nothing whatsoever in the opinion which is inconsistent with the existence of the

power of a state to impose an apportioned ad valorem tax upon personal property employed in interstate commerce. In the event the *Spector case* had any application to the issue of ad valorem property taxes, it is reasonable to assume that the Court would have made some reference to the case at the time it considered the more recent cases of *Ott v. Barge Line* and *Standard Oil v. Peck*, supra, which cases related specifically to ad valorem property taxes by states. In neither of these cases is there any reference to the *Spector case*.

The fact that the decision in the *Spector case* is not inconsistent with, and, in fact, even recognizes the lawfulness of a state apportioned ad valorem tax on personal property used in interstate commerce, is illustrated by the dissenting opinion of Mr. Justice Clark, Mr. Justice Black, and Mr. Justice Douglas, who observed:

“* * * The Court concedes, or at least appears to concede, that if the Connecticut legislature or highest court had described the tax as one * * * in lieu of an ad valorem property tax, *Spector* would have had to pay the same amount, calculated in the same way, as is sought to be collected here (by a business privilege tax) * * *.” (Parenthetical comment supplied) (p. 611).

Entirely aside from the issue in the *Spector case*, there is some language in the opinion written by Justice Clark, the general aptness of which makes the same appropriate for contemplation in a matter such as is now before the Court. Justice Clark stated:

“There is nothing spiritual about interstate commerce. It is rarely devoid of significant contacts

with the several states. Hence, this Court has long treated the problems in this field with a flexibility which the competing demands of federal and state governmental spheres have required. In the absence of federal action, this Court has been quick to recognize legitimate local interests and uphold state regulations of activities which admittedly form a part of, or impinge on, interstate commerce. See, e. g., *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 US 177, 82 L ed 734, 58 S Ct. 510 (1938). The same approach is hardly foreign to the field of state taxes * * *." (pp. 612, 613).

Point II.

Pre-emption of the Field of Air Commerce by Congress Does not Prohibit the Imposition of Fair and Reasonable State Ad Valorem Property Taxes Upon Flight Equipment Employed in Interstate Commerce Within the Taxing State.

Appellant also declares that Congress has so completely preempted the field of aviation that there is nothing left which any state might confer by way of reciprocal benefits to the industry; and, the appellant reasons, there being no possible benefits flowing from state governments, the states are completely powerless to impose any property tax upon flight equipment engaged in interstate commerce.

In support of its pre-emption theory appellant cites a number of cases decided by this Court, the first and most recently decided of which is *Public Utilities Commission of the State of California v. United Air Lines*, — U. S. —, 98 L. Ed. (Adv.) 99. At page 55 of its brief, appellant sets forth a quotation concerning the pre-emption of air commerce by Congress, which quo-

tation is incorrectly identified as being from the per curiam opinion in that case. Actually the quotation used by the appellant is from the dissenting opinion; whereas the judgment of the Court, as shown by the per curiam opinion, was a reversal of the judgment of the lower court which had declared the Civil Aeronautics Board to have exclusive jurisdiction over the rates involved.

The cases cited by appellant merely affirm that the air is not subject to private ownership or local dominion exercised in such a manner as to enable the exclusion or obstruction of commerce therein; that aircraft operating with federally designated airways must be licensed and certified by federal authority, even though operated entirely within the boundaries of one state; and that Congress has set up a comprehensive scheme for regulation of common carriers by air. We take no issue with any of these propositions. Appellant's citation of these cases is further demonstration of a failure to appreciate the inherent distinction between regulation of interstate operations and taxation of property engaged in interstate operations, to which we have previously referred. *Stone v. Interstate Natural Gas Co.*, supra.

In the argument in support of its Law Point IV, appellant strives to avoid the impact of those cases which furnish authority for the imposition of a tax such as involved in the case at bar (e. g., *Standard Oil v. Peck*, *Ott v. Mississippi Valley Barge Line Co.*, the *Johnson Oil case*, and the *Pullman Car case*, all supra), by saying that in those cases the property involved had been "within the state sufficiently to attain a taxable situs

therein." This statement, of course, simply begs the issue. However, the futility encountered by the appellant in seeking to distinguish the undeniable effect of those decisions does serve the useful purpose of bringing out into open view the theory upon which the appellant ultimately comes to rest its case. The theory of appellant's case is contained in the following statement, appearing at page 65 of its brief: "The peculiar nature of the aircraft as the incident of the tax precludes a taxable situs. The aircraft in question came in on fourteen regular schedules, but they did not traverse the highways or byways of the State." In other words, the appellant appears to take the position that the circumstance which prevents the existence of a tax situs for flight equipment engaged in interstate commerce is the fact that no use is made of the "highways or byways" of the state. We, of course, contend that use of public roads is in no way prerequisite to the acquisition of a tax situs by instrumentalities of interstate commerce. However, we also dispute the premise of the appellant that no use of public roads is made in the case of interstate air commerce. We suggest that the public roads are used and that the subjects of appellant's interstate commerce receive benefits and protection afforded by the state just as positively as if the airplanes were to taxi about over public roads to initial points of origin and take aboard its cargo, then return to the airport for take off. Further exploring this premise on the basis of a somewhat Rube Goldbergish hypothesis, suppose that as a part of its flight equipment the appellant carried self-propelled surface vehicles which conveyed the interstate cargo from points of origin over public roads to the airport where the cargo was loaded aboard the airplanes.

Although handling precisely the same cargo and operating according to precisely the same interstate schedules, the appellant's theory would permit the taxation of the surface vehicles but would forbid the taxation of the airplanes, simply because the latter did not use the public roads.

In keeping with its premise that some use of public highways is necessary to afford a tax situs over vehicles of interstate commerce in non-domiciliary states, and with the obvious view of avoiding taking a position for outright tax immunity for its flight equipment, the appellant suggests that interstate flight equipment might be taxed according to the old "home port" theory announced in *Gibbons v. Ogden* and for many years applied to ocean-going vessels. In this regard, at page 76 of its brief, appellant makes the rather startling pronouncement: "The law then stands as the law of today." Realizing, of course, that the circumstance is in no way decisive of the issue, nevertheless it is interesting to note there has been no showing that appellant presently is being taxed upon such a basis, and to speculate as to what position the appellant might assume in connection with an independent attempt by some other state to tax its flight equipment under that theory. We suspect that in such event the appellant, with abrupt awakening, would vigorously point out the fact that the theory has now been completely rejected by this Court; which indeed is the case.

There is very marked distinction between the benefits which support a use tax and the benefits which support a general property tax. In the case of a use tax, of course, there must be some specific use, or, in

the words of the appellant, some "readily distinguishable" reciprocal benefit, to which the tax can be traced; and the funds derived from a direct use tax must be devoted to the creation or maintenance of the facilities of which use is made. However, in the case of a general property tax, such as is involved here, specific tracing of reciprocal benefits or identification of the tax with particular facilities made use of by the taxpayer is not necessary. A most lucid explanation of this aspect of general property taxation is contained in *Union Refrigerator Transit Co. v. Kentucky*, supra, 199 U. S. at 203:

"But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus, every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no building or personal property to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. * * *."

The appellant, in its brief, has frequently asserted that it pays ground rental and landing fees in Nebraska, that it pays a Nebraska tax upon aviation fuel and also pays a general ad valorem property tax upon its various properties which are situated and remain upon the ground in Douglas County, Nebraska. On the basis of these facts, the appellant argues that it pays directly for all of the opportunities, benefits or pro-

tection which is afforded it in the State of Nebraska; and, therefore, there are no opportunities, benefits or protection upon the basis of which the Nebraska apportioned tax on its flight equipment can be justified.

By analogy, we may observe that the same thing would be true in the case of rail transportation, for example: Certainly the railroad companies pay directly, either by rental or capital investment, for the physical facilities they employ within the state, and pay a tax upon at least petroleum fuel, and pay a general property tax upon its various properties which remain exclusively within the state. Yet we doubt that the appellant would take the position that railroads are not lawfully subjected to the apportioned ad valorem tax upon their rolling stock which has been applied consistently throughout the course of railroad history.

Furthermore, we take exception to the appellant's assertion that it pays directly for all benefits enjoyed within the State of Nebraska. As we have previously mentioned, although the airplanes do not actually traverse the public roads of the state, the appellant is benefitted and its interstate commerce is enhanced by reason of the existence of public roads over which the subjects of such commerce are conveyed to and from the airplanes. Among the other general opportunities, benefits and protection which is accorded to the appellant, for which the appellant surely is not otherwise paying, are those of security against personal injury, loss or destruction of property and other misfortune, discomfort or inconvenience which is constantly afforded to the ever-changing stream of interstate passengers and cargo which continually passes within

the state by means of appellant's transportation system, and the availability of aid and remedy in any such event. There is even an indirect benefit to the appellant by virtue of the tax sustained school system through which the youth of the state may become enlightened persons who will naturally be inclined to patronize the business of the appellant.

Point III.

A State Ad Valorem Property Tax Upon Vehicles of Interstate Commerce, Apportioned According to Use Within the Taxing State, Does Not Constitute an Impost or Duty Within the Meaning of Article I, Section 9, Clause 5 or Section 10, Clause 2 of the Constitution; Nor Does Such a Tax Constitute Tonnage Duty Within the Meaning of Article I, Section 10, Clause 3 of the Constitution.

Appellant has neither advanced nor argued any point of law to the effect that the Nebraska taxing statute here involved is violative of Article I, Section 9, Clause 5, Article I, Section 10, Clause 2 or Clause 3, of the Constitution of the United States. However, in view of the appellant's reference to these constitutional provisions as being involved (p. 7 Brief of Appellant) and the mention of the Tonnage Clause in the Specifications of Error herein (p. 25, par. 4, Brief of Appellant), we feel that the matter should not be entirely ignored by us.

Article I, Section 9, Clause 5, insofar as pertinent here, and Article I, Section 10, Clause 2, prohibit states from laying imposts or duties. It has become well established that these constitutional provisions have

reference to direct charges upon the goods moving in interstate commerce, as opposed, for example, to an ad valorem property tax upon the vehicles engaged in such commerce. *Stone v. Interstate Natural Gas Co.*, supra; *Western Md. R. Co. v. Rogan*, 340 U.S. 520, 95 L. Ed. 501; *Canton R. Co. v. Rogan*, 340 U.S. 511, 95 L. Ed. 488.

Article I, Section 10, Clause 3, prohibits the imposition of tonnage duties by the states. Tonnage duty, within the meaning of the Constitution, is a direct charge for access to a port or harbor. *Parkersburg & O. R. Transp. Co. v. City of Parkersburg*, 107 U.S. 691, 27 L. Ed. 584, 2 S. Ct. 732; *Clyde Mallory Lines v. State of Alabama*, 296 U.S. 261, 80 L. Ed. 215, 56 S. Ct. 194. However, it has been held that the Tonnage Clause does not prohibit state charges, even though graduated according to tonnage, for specific services rendered or a reasonable charge for vessels entering port. *Clyde Mallory Lines v. State of Alabama*, supra.

Clearly, these provisions of the Constitution have no applicability in a case such as this.

Point IV.

This Court Will Indulge Every Presumption in Favor of a State's Right to Tax and Will Interfere Only When a Clear and Demonstrated Usurpation of Power Exists.

In a case such as this which may depend upon some rather close interpretations with respect to a novel situation, we submit that it is proper to pay con-

siderable respect to the proposition that this Court will indulge every presumption in favor of a state's right to tax and will interfere only when a clear and demonstrated usurpation of power exists. *Green v. Frazier*, 253 U. S. 233, 64 L.Ed. 878, 40 S. Ct. 499.

Also deserving of consideration is the proposition that to be able to find fault with a statute is not to demonstrate its invalidity. *Salsburg v. Maryland*, — U.S. —, 98 L. Ed. (Adv.) 207.

Point V.

In a Situation Involving Situs For the Imposition of a State Apportioned Ad Valorem Property Tax Upon Vehicles Engaged in Interstate Commerce, Wherein Representatives of the Taxing Authority Have Stated that the Statute in Question Cover an Average Portion of the Property Within the State Throughout the Taxing Year, a Claim that the Property Acquired no Situs For Taxation Within Such State Will be of No Avail in the Absence of Any Showing of a Lack of Administrative or Judicial Remedy For Correcting Errors of Assessment Within the State.

It is the personal view of counsel for the appellees that the Nebraska taxing statute now under consideration by this Court can be and should be sustained upon the basis of the reasoning expressed and the authorities advanced hereinbefore. However, we also feel that we would be deficient in the discharge of our duty to those whom we represent were we to neglect appropriate measures to place this case fully within the application of *Ott v. Mississippi Valley Barge Line Co.*, *supra*.

As has been previously mentioned herein, in the *Mississippi Valley Barge Line* case, there was an apparent factual controversy as to whether the vehicles there involved were used within the taxing state in such a manner as to have acquired a tax situs. In considering that feature of the case, the Court said, at page 175 of the U. S. Report:

"We do not stop to resolve the question. Louisiana's Attorney General states in his brief that the statute 'was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the taxing year.' Appellees do not suggest an absence of any administrative or judicial remedy in Louisiana to correct errors in the assessment."

Accordingly, we state that the Nebraska statute here involved is intended to, and does, cover an average portion of property permanently within the state—and by permanently is meant throughout the taxing year; and we invite the attention of the Court to the fact that the appellant does not suggest an absence of any administrative or judicial remedy in Nebraska to correct errors in assessment.

CONCLUSION.

We submit that the following conclusions with respect to the case at bar are clearly established:

(1) That the State of Nebraska has the right to impose an ad valorem personal property tax upon flight equipment of the appellant which is regularly and habitually used and employed within the state as a part of a system of continuous interstate air com-

merce over fixed routes and according to regular schedules; and that no repugnance to the Constitution of the United States will occur by reason of such tax, so long as the allocation of the proportionate part of the property value and the levy thereon bear a fair and reasonable relation to the use of such equipment within the state.

(2) That the method of taxation prescribed by the Nebraska statute here under consideration and the application thereof to the flight equipment of the appellant is of such a nature that the resulting tax does bear a fair and reasonable relation to the use of such property within the state.

The judgment of the Supreme Court of Nebraska herein should be affirmed.

Respectfully submitted,

CLARENCE S. BECK,
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Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

No. 476.—OCTOBER TERM, 1953.

Braniff Airways, Incorporated,	}	On Appeal From the		
Appellant,			Supreme Court of	
v.				the State of Nebraska.
Nebraska State Board of				
Equalization and Assess-				
ment, et al.				

[June 1, 1954.]

MR. JUSTICE REED delivered the opinion of the Court.

The question presented by this appeal from the Supreme Court of Nebraska is whether the Constitution bars the State of Nebraska from levying an apportioned ad valorem tax on the flight equipment of appellant, an interstate air carrier. Appellant is not incorporated in Nebraska and does not have its principal place of business or home port registered under the Civil Aeronautics Act, 52 Stat. 977, 49 U. S. C. §§ 401-705, in that state. Such flight equipment is employed as a part of a system of interstate air commerce operating over fixed routes and landing on and departing from airports within Nebraska on regular schedules. Appellant does not challenge the reasonableness of the apportionment prescribed by the taxing statute or the application of such apportionment to its property. It contends only that its flight equipment used in interstate commerce is immune from taxation by Nebraska because without situs in that state and because regulation of air navigation by the Federal Government precludes such state taxation.

This petition for a declaratory judgment of the invalidity of §§ 77-1244 to 77-1250 of the state tax statute ¹

¹ Neb. Rev. Stat., 1943, § 77-1244 *et seq.*

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and an injunction against the collection of taxes assessed under such provisions for previous years was filed as an original action in the court below by Mid-Continent Airlines, Inc., and tried upon stipulated facts. Subsequent to filing, but before the decision, Mid-Continent and appellant were merged on August 1, 1952, and appellant was substituted as the party plaintiff. Mid-Continent had been incorporated in Delaware with its corporate place of business in Wilmington in that state, and Braniff is incorporated in Oklahoma and has its corporate place of business in Oklahoma City. Pursuant to the merger Mid-Continent's main executive offices were moved from Kansas City, Missouri, and merged with appellant's in Dallas, Texas. The number of regularly scheduled stops in Nebraska, fourteen per day at Omaha and four at Lincoln, was not affected by the merger.

The home port registered with the Civil Aeronautics Authority and the overhaul base for the aircraft in question is the Minneapolis-St. Paul Airport, Minnesota. All of the aircraft not undergoing overhaul fly regular schedules upon a circuit ranging from Minot, North Dakota, to New Orleans, Louisiana, with stops in fourteen states including Minnesota, Nebraska and Oklahoma. No stops were made in Delaware. The Nebraska stops are of short duration since utilized only for the discharge and loading of passengers, mail, express, and freight, and sometimes for refueling. Appellant neither owns nor maintains facilities for repairing, reconditioning, or storing its flight equipment in Nebraska, but rents depot space and hires other services as required. The Supreme Court of Nebraska made no distinction as to taxability between those years when no flights were made into the state of domicile (Delaware) and those when flights did enter the state of new domicile (Oklahoma).

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It is stipulated that the tax in question is assessed only against regularly scheduled air carriers and is not applied to carriers who operate only intermittently in the state. The statute defines "flight equipment" as "aircraft fully equipped for flight,"² and provides that "any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner."³ A formula is prescribed for arriving at the proportion of a carrier's flight equipment to be allocated to the state.⁴

The statute uses the allocation formula of the "proposed uniform statute to provide for an equitable method of state taxation of air carriers" adopted by the Council of State Governments upon the recommendation of the National Association of Tax Administrators in 1947.⁵ Use of a uniform allocation formula to apportion air-carrier taxes among the states follows the recommendation

² *Id.*, § 77-1244 (3).

³ *Id.*, § 77-1245.

⁴ *Ibid.* This section provides that "The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios; (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures, shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period."

⁵ Resolutions, The Eighth General Assembly of the States, 20 State Government 95.

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of the Civil Aeronautics Board in its report to Congress.⁶ The Nebraska statute provides for reports, levy, and rate of tax by state average.⁷

Required reports filed by Mid-Continent for 1950 show that about 9% of its revenue and 11½% of the total system tonnage originated in Nebraska and about 9% of its total stops were made in that state. From these figures, using the statutory formula, the Tax Commissioner arrived at a valuation of \$118,901 allocable to Nebraska, resulting in a tax of \$4,280.44. Since Mid-Continent filed no return for 1951 the same valuation was used and an increased rate resulted in assessment of \$4,518.29. The Supreme Court of Nebraska held the statute not violative of the Commerce Clause and dismissed appellant's petition.⁸

Appellant argues that federal statutes governing air commerce enacted under the commerce power preempt the field of regulation of such air commerce and preclude this tax. Congress, by the Civil Aeronautics Act of 1938, 52 Stat. 977, 1028, § 1107 (i)(3), 49 U. S. C. § 176 (a), enacted:

"The United States of America is declared to possess and exercise complete and exclusive national

⁶ Multiple Taxation of Air Carriers, H. R. Doc. No. 141, 79th Cong., 1st Sess. Recommendations by various interested groups as to the proper method of apportionment are included in that report and its appendices. See also Arditto, State and Local Taxation of Scheduled Local Airlines, 16 J. Air L. & Com. 162; Kassell, Interstate Cooperation and Airlines, 25 Taxes 302. Mr. Bulwinkle introduced bills in accordance with the recommendation of the C. A. B. report that the National Government should prescribe the method of state taxation of air carriers. The bills adopted the Council formula utilized by Nebraska. Neither was enacted. H. R. 3446, 79th Cong., 1st Sess.; H. R. 1241, 80th Cong., 1st Sess.

⁷ Neb. Rev. Stat., 1943, §§ 77-1247, 77-1249.

⁸ *Mid-Continent Airlines, Inc. v. Nebraska State Board of Equalization and Assessment*, 157 Neb. 425, 59 N. W. 2d 746.

sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction."

This provision originated in the Air Commerce Act of 1926, 44 Stat. 568, 572, § 6. The 1938 Act also declares "a public right of freedom of transit" for air commerce in the navigable air space to exist for any citizen of the United States. 52 Stat. 980, § 3, 49 U. S. C. § 403.⁹

The provision pertinent to sovereignty over the navigable air space in the Air Commerce Act of 1926 was an assertion of exclusive national sovereignty. The convention between the United States and other nations respecting international civil aviation ratified August 6, 1946, 61 Stat. 1180, accords. The Act, however, did not expressly exclude the sovereign powers of the states. H. R. Rep. No. 572, 69th Cong., 1st Sess., p. 10. The Civil Aeronautics Act of 1938 gives no support to a different view.¹⁰ After the enactment of the Air Commerce Act, more than twenty states adopted the Uniform Aeronautics Act. It had three provisions, indicating that the states did not consider their sovereignty affected by the National Act except to the extent that the states had ceded that sovereignty by constitutional grant.¹¹ The

⁹ That space was defined in § 10 of the Air Commerce Act and freedom for its navigation declared. This was continued by the Civil Aeronautics Act, 49 U. S. C. § 180, in "airspace above the minimum safe altitude of flight prescribed by the Civil Aeronautics Authority."

¹⁰ S. Rep. No. 1661, 75th Cong., 3d Sess.; H. R. Rep. No. 2254, 75th Cong., 3d Sess.; H. R. Conf. Rep. No. 2635, 75th Cong., 3d Sess.

¹¹ 11 Uniform Laws Annotated 159:

"§ 2. Sovereignty in Space.—Sovereignty in the space above the lands and waters of this State is declared to rest in the State, except

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recommendation of the National Conference of Commissioners on Uniform State Laws to the states to enact this Act was withdrawn in 1943.¹² Where adopted, however, it continues in effect. See *United States v. Praylou*, 208 F. 2d 291. Recognizing this "exclusive national sovereignty" and right of freedom in air transit, this Court in *United States v. Causby*, 328 U. S. 256, 261, nevertheless held that the owner of land might recover for a taking by national use of navigable air space, resulting in destruction in whole or in part of the usefulness of the land property.

These Federal Acts regulating air commerce are bottomed on the commerce power of Congress, not on national ownership of the navigable air space, as distinguished from sovereignty. In reporting the bill which became the Air Commerce Act, it was said:

"The declaration of what constitutes navigable air space is an exercise of the same source of power, the interstate commerce clause, as that under which

where granted to and assumed by the United States pursuant to a constitutional grant from the people of this State.

"§ 3. Ownership of Space.—The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4.

"§ 4. Lawfulness of Flight.—Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable, as provided in Section 5."

¹² See Conference Handbook, 1943, pp. 66-67. Efforts continue to draft an acceptable State Uniform Aeronautical Code. See Conference Handbook, 1948, p. 147.

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Congress has long declared in many acts what constitutes navigable or non-navigable waters. The public right of flight in the navigable air space owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of the adjacent or subjacent soil." H. R. Rep. No. 572, 69th Cong., 1st Sess., p. 10.

The commerce power, since *Gibbons v. Ogden*, 9 Wheat. 1, 193, has comprehended navigation of streams. Its breadth covers all commercial intercourse. But the federal commerce power over navigable streams does not prevent state action consistent with that power. *Gilman v. Philadelphia*, 3 Wall. 713, 729. Since, over streams, Congress acts by virtue of the commerce power, the sovereignty of the state is not impaired. *Oklahoma v. Atkinson Co.*, 313 U. S. 508, 534. The title to the beds and the banks are in the states and the riparian owners, subject to the federal power over navigation.¹³ Federal regulation of interstate land and water carriers under the commerce power has not been deemed to deny all state power to tax the property of such carriers. We conclude that existent federal air-carrier regulation does not preclude the Nebraska tax challenged here.

Nor has appellant demonstrated that the Commerce Clause otherwise bars this tax as a burden on interstate commerce.¹⁴ We have frequently reiterated that the

¹³ *United States v. Chandler Dunbar Water Power Co.*, 229 U. S. 53, 60; *United States v. Kansas City Ins. Co.*, 339 U. S. 799, 808; *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U. S. 239, 246 *et seq.*

¹⁴ In its original petition appellant also alleged that the Nebraska statute is invalid under § 8, cl. 3, § 9, cl. 6, and § 10, cl. 5 of Art. I of the Constitution. While noting that such contentions were apparently "abandoned in brief and oral argument," the court below held

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Commerce Clause does not immunize interstate instrumentalities from all state taxation, but that such commerce may be required to pay a nondiscriminatory share of the tax burden.¹⁵ And appellant does not allege that this Nebraska statute discriminates against it nor, as noted above, does it challenge the reasonableness of the apportionment prescribed by the statute.¹⁶

The argument upon which appellant depends ultimately, however, is that its aircraft never "attained a taxable situs within Nebraska" from which it argues that the Nebraska tax imposes a burden on interstate commerce. In relying upon the Commerce Clause on this issue and in not specifically claiming protection under the Due Process Clause of the Fourteenth Amendment, appellant names the wrong constitutional clause to support its position. While the question of whether a commodity en route to market is sufficiently settled in a state for purpose of subjection to a property tax has been deter-

such provisions of the Constitution not violated. Since appellant did not preserve such contentions in its Statement as to Jurisdiction, we do not consider such issues.

¹⁵ *Western Live Stock v. Bureau*, 303 U. S. 250, 254; *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 165.

¹⁶ See *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Ford Motor Co. v. Beauchamp*, 308 U. S. 331; *Nashville, C. & St. L. R. Co. v. Browning*, 310 U. S. 362; *Greyhound Lines v. Mealey*, 334 U. S. 653, 654, 662, 663; *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174; *Canton R. Co. v. Rogan*, 340 U. S. 511, 514-516. Multiple Taxation of Air Commerce, H. R. Doc. No. 141, 79th Cong., 1st Sess.; Arditto, State and Local Taxation of Scheduled Local Airlines, 16 Jour. of Air Law & Com. 162; Howard, State Taxation of Airplanes in Interstate Commerce, 10 Mo. L. Rev. 195; Welch, The Taxation of Air Carriers, 11 Law & Contemp. Prob. 584; Green, The War Against the States in Aviation, 31 Va. L. Rev. 835; Sutherland and Vinciguerra, The Octroi and the Airplane, 32 Cornell L. Q. 161; Saxe, Federal Control of State Taxation of Airlines, 31 Cornell L. Q. 228; Ternes, Aviation Taxation, 25 Mich. S. B. J. 23; Note, 57 Harv. L. Rev. 1097.

mined by this Court as a Commerce Clause question,¹⁷ the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process.¹⁸ However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented. See *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67, and cases cited; *Wolfson and Kurland*, Jurisdiction of the Supreme Court of the United States, 149 *et seq.*

¹⁷ See *e. g.*, *Independent Warehouses v. Scheele*, 331 U. S. 70, 72; *Carson Petroleum Co. v. Vial*, 279 U. S. 95; *Champlain Realty Co. v. Brattleboro*, 260 U. S. 366; *General Oil Co. v. Crain*, 209 U. S. 211; *Coe v. Errol*, 116 U. S. 517; *Brown v. Houston*, 114 U. S. 622; *Powell, Taxation of Things in Transit*, 7 Va. L. Rev. 167, 245, 429, 497.

¹⁸ See *e. g.*, *Johnson Oil Ref. Co. v. Oklahoma*, 290 U. S. 158; *Frick v. Pennsylvania*, 268 U. S. 473; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341; *Beale, Conflict of Laws*, 533 *et seq.*; *Moore, Taxation of Movables and the Fourteenth Amendment*, 7 Col. L. Rev. 309; *Page, Jurisdiction to Tax Tangible Movables*, 1945 Wis. L. Rev. 125.

While the common-law concept of situs was recognized by this Court as a limitation on state power to tax tangible personalty prior to invocation of the Fourteenth Amendment as a defense to such taxation, the bases for such decisions varied and no consistent constitutional principle was applied. Compare the following cases: *Hays v. The Pacific Mail S. S. Co.*, 17 How. 596; *Morgan v. Parham*, 16 Wall. 471; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423; *Marye v. Baltimore & O. R. Co.*, 127 U. S. 117; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194. See also *Hartman, State Taxation of Interstate Commerce*, 13, 73 *et seq.*

A collection of this Court's decisions dealing with power to tax may be found in an Appendix to *Miller Bros. v. Maryland*, 347 U. S. 340, notes 8-20.

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Appellant relies upon cases involving ocean-going vessels to support its contention that its aircraft attained no tax situs in Nebraska. See, *e. g.*, *Hays v. The Pacific Mail S. S. Co.*, 17 How. 596; *Morgan v. Parham*, 16 Wall. 471; *Southern Pacific Co. v. Kentucky*, 222 U. S. 63. The first two cases were efforts to tax the entire value of the ships as other local property, without apportionment, when they were used to plow the open seas. The last case holds the state of corporate domicile has power to tax vessels that are not taxable elsewhere. A closer analogy exists between planes flying interstate and boats that ply the inland waters. We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats. *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169; *Standard Oil Co. v. Peck*, 342 U. S. 382. The limitation imposed by the Due Process Clause upon state power to impose taxes upon such instrumentalities was succinctly stated in the *Ott* case: "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state." 336 U. S., at 174. In *Curry v. McCanless*, 307 U. S. 357, the evolution of such restriction on state power was reviewed and the rule stated thusly:

"When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others." *Id.*, at 364.

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Thus the situs issue devolves into the question of whether eighteen stops per day by appellant's aircraft is sufficient contact with Nebraska to sustain that state's power to levy an apportioned ad valorem tax on such aircraft. We think such regular contact is sufficient to establish Nebraska's power to tax even though the same aircraft do not land every day and even though none of the aircraft is continuously within the state. "The basis of the jurisdiction is the habitual employment of the property within the state."¹⁹ Appellant rents its ground facilities and pays for fuel it purchases in Nebraska. This leaves it in the position of other carriers such as rails, boats and motors that pay for the use of local facilities so as to have the opportunity to exploit the commerce, traffic, and trade that originates in or reaches Nebraska. Approximately one-tenth of appellant's revenue is produced by the pickup and discharge of Nebraska freight and passengers. Nebraska certainly affords protection during such stops and these regular landings are clearly a benefit to appellant.

Nor do we think that Nebraska's power to levy this tax was affected by the merger of Mid-Continent with Braniff. Since "the rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of domicile," *Standard Oil Co. v. Peck, supra*, at 384, we deem it immaterial that before the merger Mid-Continent was domiciled in Delaware, a state through which its planes did not fly, and after the merger Braniff is domiciled in Oklahoma, a state through which these aircraft make regular flights.

¹⁹ *Johnson Oil Ref. Co. v. Oklahoma, supra*, at 162. See also *Pullman's Palace Car Co. v. Pennsylvania, supra*; *Ott v. Mississippi Valley Barge Line Co., supra*.

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Appellant urges that *Northwest Airlines v. Minnesota*, 322 U. S. 292, precludes this tax unless that case is to be overruled. In that case Minnesota, as the domicile of the air carrier and its "home port," was permitted to tax the entire value of the fleet ad valorem although it ranged by fixed routes through eight states.²⁰ While no one view mustered a majority of this Court, it seems fair to say that without the position stated in the Conclusion and Judgment which announced the decision of this Court, the result would have been the reverse. That position was that it was not shown "that a defined part of the domiciliary corpus has acquired a permanent location, *i. e.*, a taxing situs, elsewhere." P. 295. That opinion recognized the "doctrine of tax apportionment for instrumentalities engaged in interstate commerce," p. 297, but held it inapplicable because no "property (or a portion of fungible units) is permanently situated in a State other than the domiciliary State." P. 298. When *Standard Oil Co. v. Peck*, 342 U. S. 382, 384, was here, the Court interpreted the *Northwest Airlines* case to permit states other than those of the corporate domicile to tax boats in interstate commerce on the apportionment basis in accordance with their use in the taxing state. We adhere to that interpretation.

Affirmed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE JACKSON dissents for the reasons stated in his concurring opinion in *Northwest Airlines v. Minnesota*, 322 U. S. 292.

²⁰ Subsequent to the *Northwest Airlines* case, Minnesota enacted a tax statute incorporating an apportionment formula for allocation of the valuation of property of air carriers to Minnesota. Minn. Stat., 1945, §§ 270.071-270.079, as amended, Minn. Laws, 1953, c. 672, §§ 2-3.

SUPREME COURT OF THE UNITED STATES

No. 476.—OCTOBER TERM, 1953.

Braniff Airways, Incorporated, Appellant, v. Nebraska State Board of Equalization and Assess- ment, et al.	}	On Appeal From the Supreme Court of the State of Nebraska.
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[June 1, 1954.]

MR. JUSTICE DOUGLAS, concurring.

Braniff Airways, in challenging the power of Nebraska to lay this ad valorem tax, claims only that its planes have no taxable situs in the State. It does not claim that no fraction of the aircraft, on an apportioned basis, is permanently in the State. Nor does it attack this apportionment formula.

My understanding of our decisions is that the power to lay an ad valorem tax turns on the permanency of the property in the State. All the property may be there or only a fraction of it. Property in transit, whether a plane discharging passengers or an automobile refueling, is not subject to an ad valorem tax. Property in transit may move so regularly and so continuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem.

I mention these elemental points to reserve explicitly the validity of the apportionment formula that serves as the basis of this ad valorem tax. The formula used presents substantial questions. What might be an adequate formula for a gross receipts tax might be inadequate for an ad valorem tax. Moreover, when we are faced with a due process question, we have a problem we may not delegate to Congress.

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I do not think the Court takes a position contrary to what I have said. But there are passages in the opinion which blur the constitutional issues as they are blurred and confused in the interesting report of the Civil Aeronautics Board, H. R. Doc. No. 141, 79th Cong., 1st Sess., entitled Multiple Taxation of Air Commerce. Hence I have joined in the judgment of the Court but not in the opinion.

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[June 1, 1954.]

MR. JUSTICE FRANKFURTER, dissenting.

One of the most treacherous tendencies in legal reasoning is the transfer of ~~doctrines which are, in effect,~~ generalizations developed for one set of situations to seemingly analogous, yet essentially very different, situations. The doctrines evolved in adjusting rights as between the States to tax property bearing some relation to a number of States, and ~~the rights of~~ the taxing power of the States as against the freedom from State interferences secured by the Commerce Clause, bear, of course, a practical relation to what it is that is taxed. It took a considerable time to make this adjustment in regard to taxation of railroad property and railroad income—to decide when the States are wholly excluded from levying certain taxes, when an ad valorem tax may be levied on railroad property reasonably deemed to be permanently in a given State, and on what basis income from interstate railroad business may fairly be apportioned among different States, ~~having some relation to such income.~~ Even as to railroads, nice distinctions had to be made and the making of them has not been concluded.

It stands to reason that the drastic differences between slow-moving trains and the bird-like flight of airplanes would be reflected in the law's response to the claims of

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the different States and the limitations of the Commerce Clause upon those claims. The differences in result and the conflict even among those who agreed in result in *Northwest Airlines v. Minnesota*, 322 U. S. 292, demonstrate not the contrariness or caprice of different minds but the inherent perplexities of the law's adjustment to such novel problems as the exercise of the taxing power over commercial aviation in a federal system. The problems canvassed in that case were unprecedented, and perhaps the most important thing that was there decided was the refusal of the Court to apply to air transportation the doctrines that had been enunciated with regard to land and water transportation.

call for
^ The plain intimation of the case—that these novel problems, affecting the taxing power of the States and the Nation, ~~are more amenable to~~ the comprehensive powers of legislation possessed by Congress—found response in a resolution of Congress directing the Civil Aeronautics Board to develop the “means for eliminating and avoiding, as far as practicable, multiple taxation of persons engaged in air commerce . . . which has the effect of unduly burdening or unduly impeding the development of air commerce.” 58 Stat. 723. The inquiry thus set afoot produced an illuminating report. See H. R. Doc. No. 141, 79th Cong., 1st Sess., which analyzed the difficulties and also made concrete proposals.¹ The gist of these proposals was that Congress make an apportionment of taxes among the States over which air carriers fly, based upon relevant factors and in appropriate ratios. The basis of taxation by Nebraska, here under review, substantially reflects the factors which the Civil Aeronautics Board recommended to the Con-

¹ The proposal of this Report—that there be a uniform allocation formula to apportion taxes among the States—was adopted by the Council of State Governments. See 20 State Government 95. However no federal legislation has yet resulted.

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gress. It is one thing, however, for the individual States to determine what factors should be taken into account and how they should be weighted. It is quite another for Congress to devise, as the Civil Aeronautics Board recommended it should, a scheme of apportionment binding on all the States. Until that time, Nebraska may rely on one scheme of apportionment; other States on other schemes. And each State may, from time to time, modify the relevant factors.²

The exercise of the taxing power by one of the States by means of a formula, based on such criteria as tonnage, revenue, and arrivals and departures, may, in isolation, impose no unfair burden on commerce. And the adoption by all the States of such a basis for taxation, which only congressional action could ensure, would not offend the Commerce Clause. It is the diverse and fluctuating exercise of power by the various States, even where based on concededly relevant factors, which imposes an undue burden on interstate commerce.³

The complexity of the proposals of the Board's Report—the items to be taken into account, the balance to be struck among them, the problem of giving the States their due without unfairly burdening an industry of vital national import—indicate how ill-adapted the judicial process is, as against the choices open to Congress, for

² In addition to the problem of conflict between apportionment schemes of various States, it must be borne in mind that these schemes cannot be regarded as abstract mathematical formulas, and hence they must be closely scrutinized to ensure their fairness as applied to a given situation. See *Wallace v. Hines*, 253 U. S. 66.

³ Lest it be thought one formula of apportionment is clearly the appropriate one, it should be noted that the Board's Report sets forth three formulas proposed by responsible groups, in addition to that recommended by the Board. And while Nebraska adopted the factors recommended by the Board, it did not give them the same weight which the Board's proposed formula did. See H. R. Doc. No. 141, 79th Cong., 1st Sess. 58.

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dealing with these problems and how warily this Court should move within the limits of its own inescapable duty to act. The protection of interstate commerce against the burden of multiple taxation ought not to be left to litigation growing out of changes in the methods of taxation.

"The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce." *Freeman v. Hewit*, 329 U. S. 249, 256.

This would not be the only instance in which a constructive adjustment of competing considerations required congressional legislation and was beyond the scope of the judicial process. *Davis v. Department of Labor*, 317 U. S. 249, 259; *United States v. Standard Oil Co.*, 332 U. S. 301; *Halcyon Lines v. Haenn Ship Ceiling & Refitting Co.*, 342 U. S. 282; *United States v. Gilman*, 347 U. S. 507.

It was not too difficult in *Northwest Airlines* to allow Minnesota to levy a personal property tax on the entire fleet of airplanes owned by a corporation of its creation, the principal place of business of which was also Minnesota. The State of Minnesota, as we said, was the only State that had such a hold on the planes. In the case before us, Nebraska has no such relation with the airplanes on which it seeks to impose an ad valorem tax.

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This Court has held that a State may levy an ad valorem tax on the basis of a showing that the total time spent in a State by different units of a carrier's property is such that a certain proportion of that property may be said to have a permanent location in that State. Such a doctrine of apportionment, as the basis of property taxation, was adopted by this Court in *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, with relation to railroad cars; and in *Ott v. Mississippi Barge Line Co.*, 336 U. S. 169, with relation to barges. But boats and railroad cars which spend hours and days at a time in a State have a closeness and duration of relationship to that State obviously not true of planes which make brief stopovers for a few minutes.

The appealing phrase that "interstate ~~commerce~~ must pay its way" can be invoked only when we know what the "way" is for which interstate ~~commerce~~ must pay. Of course, the appellant must pay for the use of airports and other services it enjoys in Nebraska. It must pay a tax on all its property permanently located in Nebraska. Like everyone else it must pay a gasoline tax. In fact it pays approximately \$22,000 a year for the use of the airport, \$14,000 a year in gasoline taxes, and appropriate property taxes on office equipment, trucks and other items permanently in Nebraska.

But only those who have a sufficiently substantial relation to Nebraska that they may fairly be said to partake of the benefits, though impalpable and unspecific, it gives as an ordered society, may be taxed because they partake of those benefits. And even then, of course, an undue burden must not be cast on commerce. Not unless Nebraska can show that appellant has airplanes that have a substantially permanent presence in Nebraska can Nebraska exert its taxing power on their presence. I do not believe that planes which pause for a few moments can be made the basis for the exercise of

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such power.* If Nebraska can tax without such a tie, every other State through which the planes fly or in which they alight for a few minutes can tax. Surely this is an obvious inroad upon the Commerce Clause and as such barred by the Constitution.

It cannot be said that for airplanes, flying regularly scheduled flights, to alight, stop over for a short time and then take off is so tenuously related to Nebraska that it would deny due process for that State to seize on these short stopovers as the basis of an ad valorem tax. But the incidence of a tax may offend the Commerce Clause, even though it may satisfy the Due Process Clause.

I am not unaware that there is an air of imprecision about what I have written. Such is the intention. Until Congress acts, the vital thing for the Court in this new and subtle field is to focus on the process of interstate commerce and protect it from inroads of taxation by a State beyond "opportunities which it has given, . . . protection which it has afforded, . . . benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444.

* With the exception of one plane which remains in Nebraska overnight, all of the Company's planes remain in Nebraska for periods of between five and twenty minutes each day. Considering this brief time spent on the ground by planes which stop in transit, more than a bare assertion that flight equipment is "permanently" in Nebraska is called for to establish the requisite permanence for taxing purposes.